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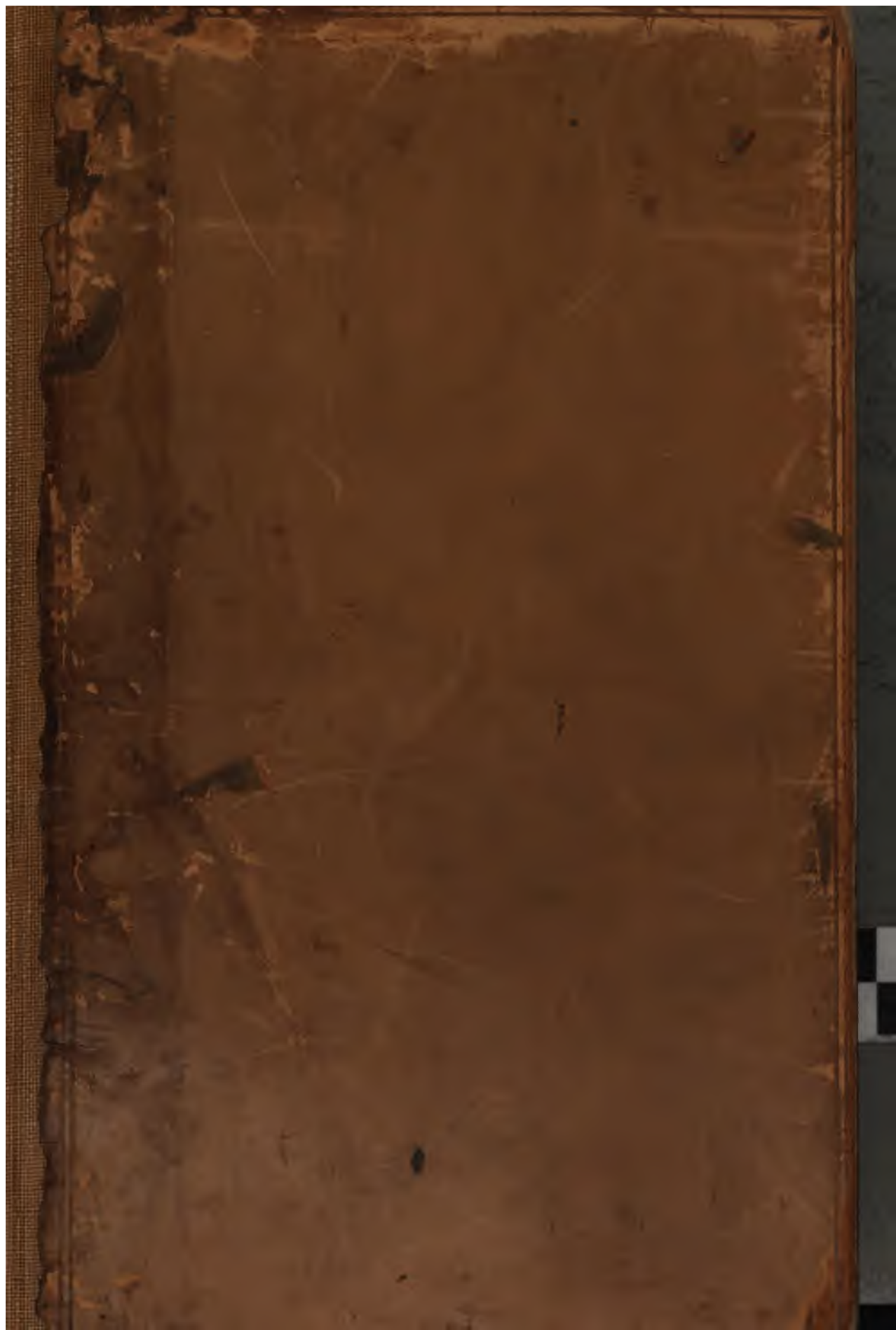
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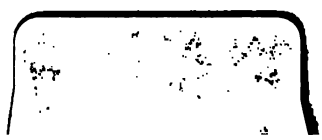


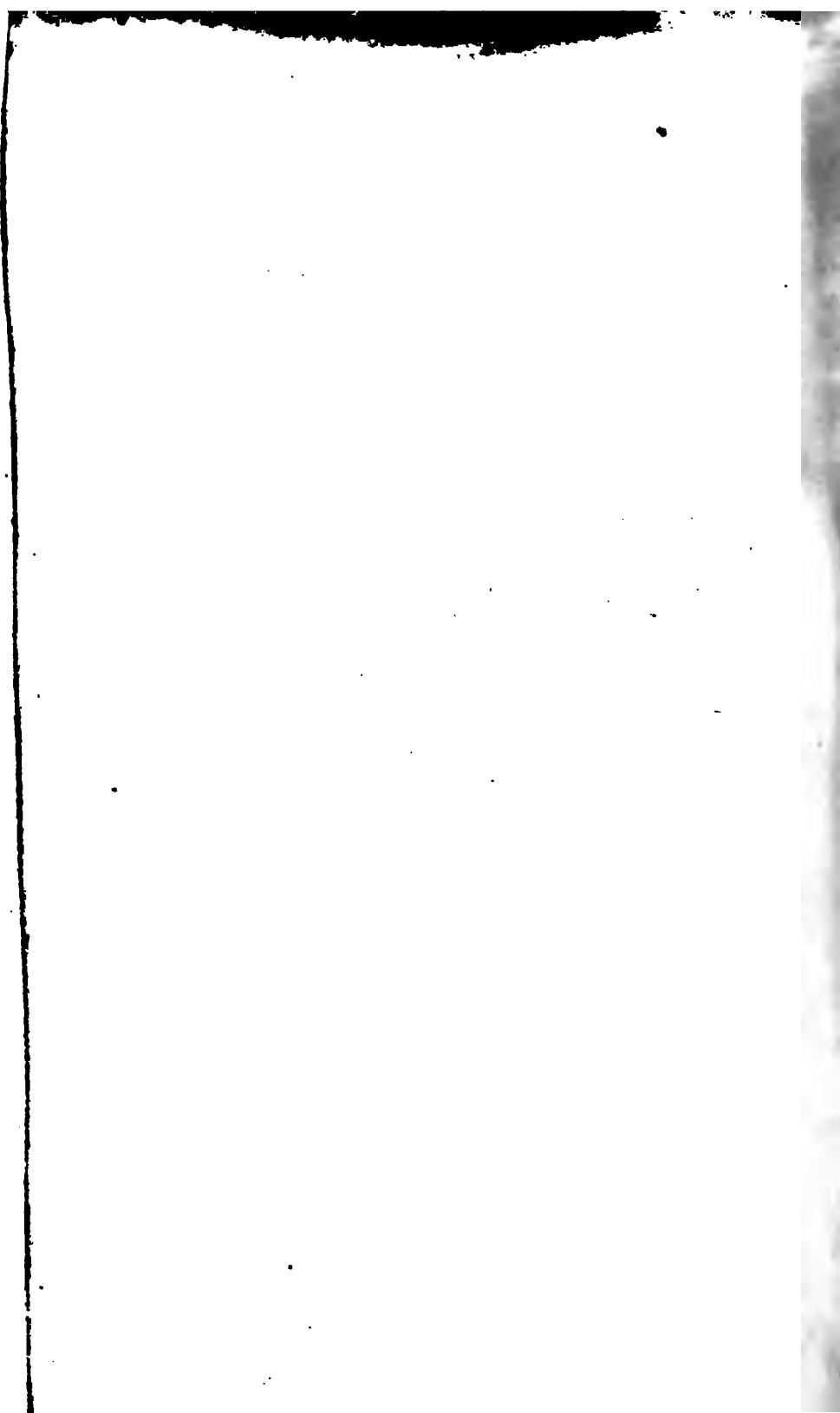
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REPORTS

OF

CASES

ARGUED AND DETERMINED

IN

The Court of King's Bench.

WITH TABLES OF THE NAMES OF THE CASES ARGUED
AND CITED, AND THE PRINCIPAL MATTERS.

BY

JOHN LEYCESTER ADOLPHUS, OF THE INNER TEMPLE,

AND

THOMAS FLOWER ELLIS, OF THE MIDDLE TEMPLE,

ESQRS. BARRISTERS AT LAW.

VOL. VII.

CONTAINING THE CASES OF PART OF TRINITY TERM, IN THE
SEVENTH YEAR OF WILLIAM IV., AND MICHAELMAS AND HILARY
TERMS, IN THE FIRST YEAR OF VICTORIA. 1837-8.

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J U D G E S
OF
THE COURT OF KING'S BENCH,
DURING THE PERIOD OF THESE REPORTS.

The Right Hon. THOMAS LORD DENMAN, C. J.
Sir JOSEPH LITTLEDALE, Knt.
Sir JOHN PATTESON, Knt.
Sir JOHN WILLIAMS, Knt.
Sir JOHN TAYLOR COLERIDGE, Knt.

ATTORNEY GENERAL.
Sir JOHN CAMPBELL, Knt.

SOLICITOR GENERAL.
Sir ROBERT MOUNSEY ROLFE, Knt.

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ERRATA.

- Page 117. line 10. for "G. 4." read "G. 3."
171. l. 23. for "plea" read "replication."
172. l. 17. for "10" read "9."
356. note (b), read "Alcock and Napier."
536. marg. note, l. 16. } for "40" read "39 & 40."
537. l. 10. }
548. l. 23. for "(c)" read "(b)."
553. l. 19. after "He," insert "stated that Ramplin, a former occupier of the meadow over which the road ran."
- l. 22. for "he" read "Ramplin."
587. l. 27. "insert "to" between "fact" and "which."
605. l. 19. for "3" read "2."
683. note (b), for "7 A. & E." read "4 A. & E."
745. marg. note l. 28. } for "2" read "2 & 3."
746. l. 17. }
747. l. 29. }
791. l. 22. for "daily" read "duly."

C A S E S

ARGUED AND DETERMINED

1837.

IN THE

Court of KING's BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Trinity Term,

In the Seventh Year of the Reign of WILLIAM IV. (a).

The Judges who usually sat in Banc in this term were,

LORD DENMAN C. J.

PATTESON J.

LITLEDALE J.

WILLIAMS J.

SMITH *against* DIXON.

*Monday,
May 22d.*

ASSUMPSIT. The declaration stated that defendant, on &c., bargained for and bought of plaintiff, and plaintiff, at the request of the defendant, then sold quantity, viz. not less than 5000 nor more than 6000 oak trees, of the height of &c., and at the price of &c., to be well taken up by plaintiff at the usual and proper time, and, within

(a) For the beginning of cases of *Trinity* term, 1837, see vol. vi. p. 829. et seq.

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within a reasonable time after, to be delivered by plaintiff to defendant, and by him paid for on delivery as aforesaid; and that, in consideration thereof, and that plaintiff promised to take up &c., and deliver &c., defendant promised to accept and pay for the trees. Averment, that plaintiff well and properly took up for defendant six thousand oak trees of the height &c., at the usual and proper time, and was, within a reasonable time, ready to deliver, and tendered, the said trees, but defendant would not accept, &c.

sold to defendant, a large quantity, that is to say, not less than 5000 nor more than 6000 oak trees, being not less than $2\frac{1}{2}$ feet nor more than 3 feet in height, at the price of 1*l.* 5*s.* for each thousand; the said oak trees to be well taken up by plaintiff, at the usual and proper time in the year for taking up oak trees, and within a reasonable time afterwards to be delivered by plaintiff to defendant's order, at *Bishop Brig* in the county of *Lincoln*, and to be paid for by defendant to plaintiff on the delivery thereof as aforesaid: and, in consideration thereof, and that plaintiff, at the request of defendant, then promised defendant to take up the said oak trees as aforesaid, and to deliver the same to him, defendant, in the time and at the place aforesaid, defendant then promised plaintiff to accept the said oak trees of and from the plaintiff, and to pay plaintiff for the same on the delivery thereof to defendant as aforesaid: Averment, that afterwards, on 10th *February*, A.D. 1835, plaintiff well and properly took up for defendant 6000 oak trees, being not less than $2\frac{1}{2}$ feet nor more than 3 feet in height, of the value of &c., which said 10th day of *February* then was the usual and proper time of the year for taking up oak trees as aforesaid; and, although plaintiff was afterwards, and within a reasonable time in

Plea, that plaintiff did not well and properly take up for or tender or offer to deliver to defendant six thousand oak trees of the height &c., in manner and form &c.

Held, 1. That the plea was not bad, as rendering the number of trees material, because the number had been made material by the declaration, the allegation of the precise number being the only allegation shewing that the number taken up was between 5000 and 6000. But, 2., that the plea was bad for duplicity.

Plea, that, by the usage "of trade," and according to the terms of the contract, it was plaintiff's duty not to take up or tender the trees till defendant should give an order, or a reasonable time for his doing so should have elapsed; and that defendant had not given an order, nor had a reasonable time elapsed, by reason whereof the trees, if accepted, would have been of little or no value to defendant. Admitted to be bad.

Further plea, that the trees which defendant bargained for and bought of plaintiff were trees then growing at *M.*, and that the trees taken up and tendered were not the same which defendant bargained for and bought, nor were they trees which, at the time of the bargain, &c., were growing at *M.* Held bad, as amounting to the general issue.

that

that behalf, viz. on the day and year last aforesaid, ready and willing, and then tendered and offered, to deliver the said oak trees to defendant or to his order at *Bishop Brig* aforesaid, and then requested defendant to accept the same, and to pay him for the same as aforesaid; yet defendant disregarded his promise, &c. : Averment, that defendant did not nor would accept or pay for the trees, or any or either of them, but neglected and refused &c.; whereby the trees, being so taken up as aforesaid, perished and became of no value to plaintiff.

Second plea. That plaintiff did not well and properly take up for, or tender or offer to deliver to, defendant, or to his order, at *Bishop Brig* aforesaid, 6000 oak trees being not less than $2\frac{1}{2}$ feet nor more than 3 feet in height, in manner and form &c. Conclusion to the country.

Third plea. That the oak trees in the declaration mentioned were to be delivered by plaintiff to defendant's order at *B. B.*, in manner in the declaration mentioned; and that it was plaintiff's duty, according to the usage and custom of trade, and according to and in compliance with the terms of the said supposed contract in the declaration mentioned, to have abstained from taking up or offering to deliver the trees, or any of them, until defendant should have given plaintiff an express order so to do, or a reasonable time for his giving such order should have elapsed: Averment, that, at each of the times of plaintiff's taking up and offering to deliver, &c., as in the declaration mentioned, defendant had not given plaintiff any order &c., nor had a reasonable time &c. elapsed; and, by means of the premises, the trees, if defendant had taken or accepted them, would have been of little or no value to defendant, and

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of far less value than if they had been taken up and delivered by his express order, which order he would have given in such reasonable time, but for the premises. Verification.

Fourth plea. That the said oak trees which defendant bargained for and bought of plaintiff, as in the declaration mentioned, were oak trees then being and growing in a certain nursery ground of plaintiff at *Market Raisin*, in the county of *Lincoln*: and that the said oak trees, which plaintiff so took up for and offered to deliver to defendant, as in the declaration mentioned, were not, nor was any of them, &c., the same trees which defendant had bargained for and bought of plaintiff, as in the declaration and in this plea mentioned; nor were the said oak trees, which plaintiff so took up, &c., or any of them, &c., trees or a tree which, at the time of the said bargain and sale, were or was being or growing in the said nursery ground of plaintiff at *M. R.* aforesaid. Verification.

Demurrers. To the second plea, assigning for causes that the plea is multifarious; that, in denying that plaintiff well and properly took up the trees, it contains a negative pregnant; and that the traverse is too large, in making the exact number and height of the trees mentioned in the declaration material. Joinder.

To the third plea, assigning for causes, among others, that the plea does not confess and avoid, or deny, the cause of action; that it does not state any matter of discharge, nor shew the contract to be void or voidable; that it sets up a different contract from that declared upon, but does not traverse the latter; that it is argumentative and multifarious; and that it amounts to the general issue. Joinder.

To

To the fourth plea, assigning, among others, the same causes as those last stated. Joinder.

The demurrers were argued in last *Easter* term (a).

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Archbold, for the plaintiff. The second plea is bad, in the first place, because it denies both that the plaintiff took up the trees, and that he tendered them. It is said, in *Doctrina Placitandi*, p. 136., tit. *Double Pleas*, 1., that if defendant plead no such arbitrement *made or delivered* to him, that is double matter; and the book refers to *Yearb. Pasch.* 10 *Ed.* 4. f. 6 b. pl. 14., *Mich.* 5 *H.* 7. f. 7 a. pl. 14., *Trin.* 15 *H.* 7. f. 10 b. pl. 18., *Dyer* 242. a. (b). And the like law is laid down in cases which are put of detinue and debt on bond. Here it would be an answer to the action, either that the plaintiff did not well or properly take up the trees, or that he did not offer to deliver them. Secondly, the contract declared upon is, to take up and deliver not less than 5000 nor more than 6000 trees: the plea alleges that the defendant did not take up or offer to deliver 6000. But the plaintiff would be entitled to recover if he had taken up or offered to deliver 5999. [*Patteson J.* You have made the number material by your averment that you took up "6000 oak trees," and offered to deliver "the said oak trees." If the declaration does not make it material, the plea does not.] It was necessary for the plaintiff to specify some number, though any between 5000 and 6000 would have sufficed. His claim of damage (subject to inquiry before a jury) is founded

(a) *April* 25th, before Lord *Denman C. J.*, *Littledale*, *Patteson*, and *Coleridge Js.*; and *April* 28th, before Lord *Denman C. J.*, *Patteson* and *Coleridge Js.*

(b) *Anonymous Case*, 2 *Dyer*, 242 a. pl. (51.).

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upon the number. The defect in this plea is like that which was held fatal in *Newhall v. Barnard* (a), where a part of the alleged cause of action was held to be unanswered. Further, the allegation that the plaintiff did not *well and properly* take up the trees, is too vague; *Hume v. Liversidge* (b). And the averment that the defendant did not deliver 6000 trees is a negative pregnant with the affirmative that he delivered a smaller number, which may have exceeded 5000. The third plea alleges a custom of trade, but does not specify any trade. Nor can such a custom be imported to control or add to the contract; *Greaves v. Ashlin* (c).

Wightman, contra, was then called upon by the Court (d). The third plea cannot be sustained; the second and fourth are good. As to the second. If there is any error in making the number 6000 material, the fault arises from the declaration. It is material to the action that the number should have been between 5000 and 6000; the plaintiff might have stated that he took up and tendered a number not less than 5000 nor greater than 6000, videlicet &c. But the declaration neither limits the number by the averment of neither more nor less, nor does it even state the specified number under a videlicet, supposing that that would have dispensed with proof of the precise number as alleged. But the rule laid down in note (1) to *Dakin's Case* (e) is that, "where any thing which is not material is laid

(a) *Yelv.* 225. *S. C.* 1 *Bulst.* 116.

(b) 3 *Tyr.* 257. *S. C.* 1 *Cro. & M.* 332.

(c) 3 *Camp.* 426.

(d) The Court inquired whether *Wightman* would support his pleas, or amend; and, to give time for consideration, they allowed the case to stand over from April 25th to April 28th.

(e) 2 *Wms. Saund.* 291 c.

under

under a videlicet, the party is not concluded by it; but he is, where there is no videlicet;" and *Symmons v. Knox* (a) is cited. *Arnfield v. Bate* (b) and *Crispin v. Williamson* (c) also explain the doctrine on this subject. Here, in the absence of any averment that the number was between the prescribed limits, the particular number stated was material in the declaration. And, if the plea had merely said that the plaintiff did not take up or offer to deliver the said trees, that, by reference to the declaration, would have been equivalent to mentioning 6000. In *Newhall v. Barnard* (d) the declaration was for stopping three lights: the defendant justified stopping two by the custom of *London*, and the stopping of the third, in part, by the same custom, and concluded, absque hoc, that he was guilty aliter vel alio modo: and it was held, on demurrer, that the justification in part as to one light was uncertain, and that the declaration was not answered as to the third light, "for the plaintiff had supposed *totum lumen et aer* to be stopped in three several lights, and the defendant does not answer the stopping of the third light but in part, and so for the others he confesses himself guilty, and his traverse is idle; for if he does not justify the whole, he is guilty in the whole." This case (which is commented upon in *Osborne v. Rogers* (e)) is an authority in favour of the present plea. Then as to the objection that the plea traverses both the taking up and the offering to deliver. [Lord *Denman* C. J. It seems reasonable to understand "take up and deliver" as signifying merely that the party would deliver.] *Webb v.*

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(a) 3 T. R. 68.

(b) 3 M. & S. 173.

(c) 8 Taunt. 107.

(d) Yelv. 225. S. C. 1 Bulst. 116.

(e) 1 Saund. 268.

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Weatherby (a) is, in principle, not distinguishable. There, the defendant, in assumpsit, pleaded payment of a sum in full satisfaction and discharge, and acceptance of such sum in full satisfaction &c. ; and a replication denying that the sum was paid in full satisfaction &c., or accepted in full satisfaction &c., was held good on demurrer. Issue must be joined on a single point, but need not be on a single matter of fact. The trees must have been taken up, to be delivered. The fourth plea is, in substance, that the trees taken up and tendered were not those bought. It is said that this amounts to the general issue. But to this action, which is on a special contract, such a defence could not be made under non assumpsit, since the new rules. [Lord Denman C. J. The contract alleged in the declaration is not for specific trees, but for trees of a certain description. You say that the trees offered were not those you bargained for, when, in fact, you did not bargain for any. Coleridge J. You assume that certain trees were bargained for. Patteson J. You add a term to the contract, and then deny that it was fulfilled. If you had denied the contract declared upon, and the contract proved had been such as you have pleaded, the plaintiff must have applied to amend.] If the opinion of the Court is against the defendant on this point, it will be sufficient to rely on the second plea.

Archbold in reply. The observation, that alleging an omission to take up and deliver is in effect the same as alleging an omission to deliver, is inconsistent with the law laid down in *Doctrina Placitandi*, p. 136, that a plea of “no such award made or delivered” is double.

(a) 1 New Ca. 502.

Both

Both the well taking up and the delivery were necessary to the maintenance of the action; one or the other should have been traversed, not both. The rules as to putting facts in issue are different with respect to a declaration and to a plea. If a declaration contains several facts, they cannot all be traversed, unless by the general issue; facts stated in a plea may all be put in issue, if they form one defence. In *Webb v. Weatherby* (a) the facts pleaded formed but one defence. As to the averment that the plaintiff took up and offered to deliver 6000 trees; this is not one of the class of cases in which a videlicet is necessary, according to Serjt. *Williams* in note (1) on *Dakin's Case* (b), to prevent the party pleading from being concluded. The number alleged is no part of the description of the contract: the plaintiff is merely stating that, in endeavouring to fulfil his contract, he took up and tendered so many trees; the substance of his averment is, that he offered performance so far as he was bound in law. The defendant should have pleaded that the plaintiff did not tender or offer the trees in the declaration mentioned in manner and form &c. On issue joined upon that plea, the plaintiff must have proved a tender of trees from 5000 to 6000.

Cur. adv. vult (c).

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the substance of the pleadings, his Lordship proceeded:—

The principal grounds of demurrer are, first, that

(a) 1 *New Ca.* 502.

(b) 2 *Wms. Saund.* 291 c.

(c) *Littledale J.* was present at the first day's argument only; but Lord Denman C. J. said that the Court would confer with him before giving judgment.

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the defendant has made the number material by his plea, which he had no right to do : secondly, that the plea is double, because it traverses, not only the well and properly taking up, but the subsequent offer to deliver.

On the first ground, we are of opinion that the plea is good. The plaintiff has himself made the number material, by not averring that the number was within the limits prescribed by the contract. If that averment had been inserted in the declaration, the number would have been immaterial, and the question would have turned on the want of a *videlicet*. But, as the declaration stands, it is only by taking the number stated as material that the declaration itself can be supported ; for so only is there any averment of performance of the condition precedent to take up a number of trees within the prescribed limits.

On the other ground, we are of opinion that the plea is bad. The well and properly taking up of the trees depends on the time and manner in which it was done, and is not necessarily coupled with any subsequent offer to deliver. If the plaintiff fails to prove the well and properly taking up, the defendant would be entitled to a verdict, though there had been an offer to deliver. On the other hand, if he fails to prove the offer to deliver, the same consequence would follow, though he should establish that the trees were well and properly taken up. Formerly, the plea of non assumpsit would have put in issue both facts ; but now all facts intended to be denied must be specially traversed, yet not two by one traverse as it is here.

Judgment must be for the plaintiff.

Judgment for the plaintiff.

1837.

BLAND *against* WARREN.*Wednesday,
May 24th.*

ARCHBOLD had obtained a rule in *Hilary* term last, calling upon the plaintiff to shew cause why the trial had, and the verdict, in this cause, should not be set aside for irregularity, and a new trial be had. By the affidavits in support of the rule, it appeared that the action was on a note of hand, and that the attorney was instructed to defend it: that issues were joined on three pleas; — 1. payment of part; 2. that the plaintiff and the defendant's other creditors had entered into a composition, and that the note was given in fraud of the other creditors; 3. non assumpsit: — that notice of trial was given for the second sittings in *Hilary* term, and continued to the third sittings: that the plaintiff's attorney had asked the defendant's attorney to continue his notice of trial till the sittings after term, which had been refused, as the bail were desirous of going to trial: that the defendant's attorney was prepared to attend the trial, but the sittings paper stated that none but undefended causes would be tried on the 5th of *May* (the day of the third sittings): and that the defendant's attorney had no idea that the cause would be called on, since (as he stated) the plaintiff's attorney knew that it was defended. That on the 6th of *May*, on his serving the plaintiff's attorney with notice to prove the consideration for the note, the latter said that he had tried the cause and got a verdict. That the defendant's attorney received no notice that the cause would be taken as undefended, and was ignorant of the intention to try; that

If the marshal enters a cause as undefended, for the day on which undefended causes are taken, in *Middlesex*, the defendant, if he mean to defend it, must instruct counsel to appear on that day, and state that it is defended, or, at any rate, must give the plaintiff notice to that effect. In default of this, if the plaintiff try the cause as undefended, and obtain a verdict, the defendant, though upon affidavit of merits, will be allowed to set the verdict aside only on payment of costs.

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that the Marshal's office had been searched, and that the cause was set down for trial in the list of undefended causes for the 5th of *May*, out of its regular turn in the printed list (a), and was tried without the knowledge of the defendant's attorney. The attorney deposed to merits.

In answer, the plaintiff's attorney stated that, after notice of continuance had been given by him, on the 17th of *April*, for the third sittings, he (in consequence of the defendant's attorney refusing to consent to have the cause set down for the sittings after term instead of the third sittings in term) set down this cause for trial in the regular way, and not out of turn; that, on the 5th of *May*, no counsel appeared for the defendant; and that the plaintiff's counsel stated to the Judge who tried the cause that no notice to try it as undefended had been given, when his Lordship, after consulting the associate, stated that, it being an undefended sitting, defendant ought to have instructed counsel to appear, and thereupon the cause was proceeded in; that the plaintiff's attorney had witnesses in attendance to support the plaintiff's issues: that, by the practice of the Court, he was not bound to give notice of trying the cause as undefended, and that all causes are taken as undefended at the third sittings in term, unless counsel appears for the defendant, and produces an affidavit of merits; that the defendant's attorney must have known this from a note appended to the sittings paper of *Easter* term; viz. "None but undefended causes will be taken on the 5th of *May*:" that the plaintiff's attorney gave no notice to the Marshal to call on the cause as undefended;

(a) It was stated that the list of undefended causes for the third sitting was not printed. The cause was in *Middlesex*.

that

that it was called on in turn as a cause set down for the third sittings; that the plaintiff's attorney did not know that it would be defended; and that he now believed there was no defence on the merits.

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Humfrey now shewed cause, and contended that the rule could be made absolute only on payment of costs; that the practice formerly was, merely for counsel to appear and state that the cause was defended; but that now there must be an affidavit of merits at the same time.

Archbold, contra, contended that, where a cause is placed in the undefended list before its regular turn according to the full printed list, the plaintiff must give the defendant two days' notice of his intention to have it taken as undefended; that the fact of the cause having been taken out of turn appeared impliedly even from the affidavits against the rule, in which it was stated that the cause was not set down for trial until the 17th of *April*; that it would be absurd to require every defendant in the whole list to instruct counsel to appear on the day of the undefended causes; and that the nature of the pleas shewed an intention to defend.

Lord DENMAN C. J. The Marshal makes out a list of undefended causes for the last sitting, consisting of all those in which he has not had notice from the plaintiff that they are defended. He brings down the records in all those cases. If the defendant means to defend, he must appear by counsel and say so; and in *London*, but not in *Middlesex*, there must be an affidavit of merits. The two days' notice required from the plaintiff, to which Mr. *Archbold* refers, is only when the cause is taken out of its order on any other day of the sittings,

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sittings, when there is a particular list for that day, in which such cause is not included. Here the defendant neither instructed counsel to state that the cause was defended, nor even gave notice to the plaintiff to that effect. The pleas do not necessarily show any such intention. Therefore, if the defendant wishes for a new trial on affidavit of merits, it must be on payment of costs.

LITTLEDALE and PATTESON Js. (a) concurred.

Rule absolute, on payment of costs by the defendant.

(a) *Williams J.* was sitting in the Bail Court for *Coleridge J.*, who was unwell.

Thursday,
May 25th.

DOE on the Demise of VERNON and Another
against ROE.

Declaration in ejectment was served, and a rule obtained for judgment against the casual ejector, unless the tenant should appear and plead. The tenant did not appear, but a Judge's order was obtained

THE declaration in this ejectment was served in *May* 1835, with the usual notice to the tenant in possession, *George Richards*: and a rule was obtained in the ensuing *Trinity* term for judgment against the casual ejector, unless the tenant should appear and plead. The tenant never appeared. On *June* 15th, 1835, a Judge's order was made, entitled "*Doe dem. Vernon v. Roe, (Richards, tenant),*" that the attorney for

for delivery of particulars to the defendant; and a like order, by consent, that the defendant should have ten days to plead after delivery of particulars. The lessor of the plaintiff took no step for a year; he then delivered particulars, and after the expiration of ten days signed judgment against the casual ejector.

Held that, after the year, the lessor of the plaintiff could not proceed without giving a term's notice, though the tenant had not appeared.

During the year, the attorneys for the lessor of the plaintiff had written to the tenant's attorney, inquiring what course the tenant meant to take, and threatening immediate proceedings; they had also, in conversation with the tenant's attorney, stated the proofs in support of their client's title.

Held, that such intimations did not dispense with the term's notice.

And that the judgment against the casual ejector must be set aside, but not with costs, no consent rule having been entered into, and there being, therefore, only a nominal plaintiff.

the

the lessor of the plaintiff should deliver to the defendant's attorney a particular of the premises, and that proceedings should be stayed in the mean time; and on *June* 30th another order, entitled *Doe dem. Vernon v. Roe*, was made by consent, that the defendant should have ten days to plead after delivery of particulars, pleading issuably, rejoining gratis, and taking short notice of trial, if necessary, for the next assizes. The particulars were not delivered till *February* 2d, 1837, when *Richards's* attorney declined receiving them, unless conditionally; and *Richards*, on being referred to, insisted on a term's notice of proceeding, more than twelve months having elapsed since any step was taken. The plaintiff's attorney denied the necessity of such notice, and, on *February* 15th, he signed judgment against the casual ejector. On summons before *Williams J.*, the learned Judge ordered that the judgment should be set aside for irregularity, with costs. *Whateley*, last term, obtained a rule nisi for discharging this order.

It appeared, by the affidavits in opposition to the rule, that *Richards* had, in *October* 1834, signed an undertaking to give up possession on *January* 1st, 1835: that the plaintiff's attorneys, in *February* 1836, inquired, in a letter to *Richards's* attorney (with whom they were in correspondence on other subjects), what *Richards* meant to do, and received for answer that no instructions had been received from *Richards* at present: that, in *June* 1836, they again wrote, repeating the inquiry, and threatening, unless possession were given, to proceed summarily under the written authority; and that they received an answer, dated *June* 28th, from *Richards's* attorney, stating that he did not know *Richards's* intention, but would, if he called, show him the letter from
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the plaintiff's attorneys, and write to them in answer. The affidavits also stated a conversation, in *October* 1836, between one of the plaintiff's attorneys and the attorney for *Richards*, touching the claims of the respective parties, in which the plaintiff's attorney gave proofs, which he conceived to be satisfactory, that *Richards* had no title. The defendant's attorney, in his affidavit in support of the summons, stated that, in consequence of the delay in furnishing the particulars, he, and, as he believed, *Richards*, had given up all thought of the action being proceeded in.

John Bayley now shewed cause. The rule laid down in 1 *Tidd's Practice*, 468. (a) is that, "If four terms have elapsed since the delivery of the declaration, the defendant shall have a whole term's notice of the rule to plead, before judgment can be entered against him, unless the cause have been stayed by *injunction*, or privilege." It is added, "This rule was established, for the purpose of preventing any surprise on the defendant, after the plaintiff has lain by four terms, without proceeding in his action; and therefore it does not apply, where the proceedings have been delayed at the defendant's request." It is contended on the other side, first, that the communications made here by the plaintiff's attorneys to the attorney for *Richards* were a sufficient intimation that the proceedings were not abandoned. But (supposing that what had passed amounted to such an intimation) there is no instance of a departure from the rule stated by Mr. *Tidd*, except in such cases as he points out. Then it is contended that

(a) 9th edit.

Richards,

Richards, not having appeared, is not in a situation to contest the judgment. But the rule for judgment against the casual ejector unless the tenant should appear and plead, being of *Trinity* term 1835, expired after the lapse of four terms, for want of the notice of proceeding: the cause, therefore, as to the casual ejector, is out of court; and that may be insisted upon, though the tenant has not appeared. [*Littledale J.* You had no right to particulars before you had appeared.] By the rule, *Hil. 2 W. 4. I. 47. (a)*, a defendant may have an order for particulars before appearance. [*Littledale J.* That does not apply to a casual ejector.]

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DOX dem.
V. VANON
against
Box.

Whateley, contra. The correspondence, and the verbal communication by the plaintiff's attorney to the defendant's, were a complete intimation, within the year, that the action would be proceeded in: *Richards* could not suppose it abandoned. A term's notice, therefore, was not necessary; *Richards v. Harris (b)*. Besides, the application for time to plead (if there was a party entitled so to apply) was a delay of proceedings at the defendant's request, within the rule laid down in *Tidd*. But, further, there is no real defendant in Court by whom the order for setting aside the judgment can properly be sustained, the tenant not having appeared. [*Littledale J.* He could not appear after you had signed judgment.] The order is, at least, wrong as to costs; for there has been no consent rule, and costs cannot be given against a nominal plaintiff; *Goodright dem. Ward v. Badtittle (c)*.

(a) 3 B. & Ad. 380.

(b) 3 East, 1.

(c) 2 W. Bl. 763.

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Dox dem.
VERNON
against
ROL.

LORD DENMAN C. J. There is nothing here to take away the necessity of a term's notice. It cannot be said that there was an application on the defendant's part to stay the proceedings. The case last cited, as to costs, applies; and so much of the order as relates to costs must be set aside. As to the rest, the rule must be discharged.

LITLEDALE J. The judgment was irregular. It is true that the tenant had no right to take out a summons for particulars till he had appeared. Still, the Judge having made an order for particulars as if there had been an appearance (which is very generally done in such cases), ten days were allowed for pleading after the particulars should be delivered. It was the fault of the lessors of the plaintiff that they did not deliver them within the year. Not having done so, they were irregular in omitting to give a term's notice of proceeding. The judgment, therefore, is irregular; but, as to costs, the case cited from Sir *W. Blackstone* shews that the order cannot be maintained.

PATTESON J. I am of the same opinion. The plaintiffs have lain by four terms, and there was nothing, between the order for particulars and the delivery of them, amounting to a request of delay (a).

Rule absolute for discharging so much
of the order as relates to costs.

(a) *Williams J.* was absent. See p. 14. antè.

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MORTON *against* BURN and VAUX.Thursday,
May 25th.

ASSUMPSIT. The first count of the declaration stated that, whereas, before and at the time of making the promise &c., to wit 12th *April* 1834, the defendants were indebted to the plaintiff in 728*l.* 2*s.* 6*d.*, and interest thereon from 1st *February* 1834, under and by virtue of a bond, dated 14th *July* 1832, and a certain indenture and deed of assignment thereof, dated 19th *October* 1833, and that, according to the condition of the said bond, 228*l.* 2*s.* 6*d.*, part of the said sum of 728*l.* 2*s.* 6*d.*, ought to have been paid on the 1st *February* then last past, and thereupon, in consideration of the premises, and also in consideration that plaintiff would accept and receive payment of the said sums of money on the days and times after mentioned, and, in the meantime, give time to defendants for payment, the defendants undertook &c. that the whole of the said 228*l.* 2*s.* 6*d.*, with interest from 1st *February* 1834, should be paid to plaintiff on or before 1st of *June* then next, or, in default thereof, that defendants would sign a warrant of attorney to plaintiff to enter up judgment against them forthwith for the same; and that defendants would pay to plaintiff 50*l.* quarterly, on 1st *September*, &c., in every year, until the further sum of 500*l.* (residue of the said 728*l.* 2*s.* 6*d.*), with interest at 5*l.* per cent. per annum, should be

Declaration, in assumpsit, stated that defendant was indebted to plaintiff in a sum named, under and by virtue of a bond, and of an indenture and deed of assignment thereof; that, according to the condition of the bond, a certain part of that sum ought to have been paid on a certain day then past; and that, in consideration of the premises, and that plaintiff would accept payment of the whole on certain future days, and give time to the defendant in the meanwhile, the defendant promised to pay the sum then due on a day named, or in default of so doing to give plaintiff a warrant of attorney for that sum; and that he would pay the remainder on the days named, and, in default of so doing, would execute a warrant of attorney for such remainder, or so much as might be due: averment, that plaintiff did forbear; breach, that defendant did not pay, nor execute a warrant of attorney.

On motion in arrest of judgment, held, that the declaration shewed a good consideration.

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fully paid and satisfied ; and, in default of paying any of the last-mentioned instalments, defendants would execute a warrant of attorney to plaintiff forthwith to enter up judgment against them for the whole 500*l.* and interest, or so much thereof as might then remain due : averment that plaintiff did forbear and give time to defendants for the payment of the said 728*l.* 2*s.* 6*d.*, and interest, until and upon the respective days and times mentioned for payment thereof in the said promise and undertaking of the defendants ; and, although defendants paid plaintiff the said 228*l.* 2*s.* 6*d.* and interest thereon, yet they did not nor would pay plaintiff 50*l.* quarterly, on the days and times above mentioned in that behalf, but therein wholly made default ; and a large sum of money of the said instalments, viz. 250*l.*, for five several sums of 50*l.* respectively due on 1st *September* 1835, &c., now is wholly due and in arrear, &c. ; and, although defendants made default in payment of the respective sums on the days and times aforesaid, according to the tenor and effect &c. of their said promise and undertaking, yet defendants did not nor would execute a warrant of attorney to enable plaintiff forthwith to enter up judgment against them for so much of the 500*l.* and interest as then remained due, &c. There was a second count on an account stated, and for interest.

Pleas 1. Non assumpsit. 2., To the first count, that there was not any good or valuable consideration for the promises in the first count mentioned ; conclusion to the country. Issues on both pleas.

On the trial before *Coleridge J.*, at the *Middlesex* sittings after *Michaelmas* term 1836, a verdict was found for

for the plaintiff. In *Hilary* term last, *F. Edwards* obtained a rule nisi for arresting the judgment.

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Cresswell and *W. H. Watson* now shewed cause (a). It is objected that the action should have been shaped in debt, on the bond, not in assumpsit; and that the declaration shews no consideration for the promise. In *Com. Dig., Action upon the Case upon Assumpsit*, (B. 1.), it is laid down, that assumpsit may be supported upon "consideration of the forbearance of a suit against an heir upon a bond of his ancestor, if he was bound and had assets." Now there the obligee might have sued the heir on the bond. And, again, "so, in consideration of forbearance by the assignee of a bond, if he has a letter of attorney to sue and release;" for which *Pitt v. Bridgewater* is cited from *Rolle's Abridgment* (b). In *Mowse v. Edney* (c) it was held that, if *A.* be indebted to *B.* by bill, and *B.* be indebted to *C.*, and *B.*, in satisfaction of his debt, assign *A.*'s bill to *C.*, and, before the day of payment, *A.* promise *C.* that, if he will forbear payment for a week, he will then pay him, and *C.* do forbear accordingly, still there is no consideration for the promise, because, notwithstanding the assignment of the bill, yet the property of the debt remained always in the assignor. In that case it does not appear that the week would expire before the day of payment arrived; and, if not, there would be no advantage to the defendant or detriment to the plaintiff. Without some explanation of this kind, the case is inconsistent with the authorities.

(a) Before Lord Denman C. J., Littleale and Patteson Js. *Williams J.* was absent. See p. 14. *antè*.

(b) 1 *Rol. Abr.* 20. *Action sur Case*, (V), pl. 11.

(c) 1 *Rol. Abr.* 20. *Action sur Case*, (V), pl. 12. 1 *Vin. Abr.* 304. *Actions [of Assumpsit]*, (U), pl. 12.

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In *Potter v. Turnor* (a) the defendant had given a bond for 30*l.* to *J. B.*, who had given a bond for 50*l.* to the plaintiff: and *J. B.* assigned to the plaintiff the debt due from the defendant, and gave the plaintiff a letter of attorney to receive the money to his own use, with a power to sue for it, or release: the plaintiff demanded the 30*l.* of the defendant, who promised him that, if the plaintiff would forbear and give him respite till *Sturbridge* fair, he would then pay him: and, on motion in arrest of judgment, it was held that this was not a good consideration. This case is certainly against the plaintiff: but it is contradicted by all the other authorities, as is said in note (1) to *Forth v. Stanton* (b), where the cases are collected; *Reynolds v. Prosser* (c), *Oble v. Dittlesfield* (d), *Willmot v. Prigget* (e), *Russel v. Haddock* (g). In the last case, and in *Reynolds v. Prosser* (c), the debt forborne was on a judgment, which, being a higher security than a bond, seems more open to the objection against the form of action. It is sufficient consideration, if there be either a benefit to the defendant, or a detriment to the plaintiff. Here there are both. The assignee might here sue in the name of the obligee, and this Court would not allow the obligee to release the action. The contract sued on is to pay the money or do a collateral act: no one but the plaintiff can take advantage of such a contract. Here, too, the declaration avers that the defendant was actually indebted to the plaintiff: after verdict, it may be assumed that the defendant was a party to the indenture of assignment,

(a) *Palm.* 185. *S. C. Winch.* 7. (b) 1 *Wms. Saund.* 210.

(c) *Hard.* 71.

(d) 1 *Ventr.* 153.

(e) 1 *Rol. Abr.* 29. *Action sur Case*, (V), pl. 60.

(g) 1 *Lev.* 188.

and

and covenanted to pay the plaintiff: then it comes to the simple case of forbearance by a covenantee.

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F. Edwards, *contra*. A detriment to the plaintiff or a benefit to the defendant is a good consideration: but here the agreement to forbear was not binding on the plaintiff; he therefore gave up nothing, and the defendant gained nothing. After the assignment the plaintiff might have sued in equity in his own name, or at law in the name of the obligee. And, again, the plaintiff's right is not strengthened by the parol agreement: the defendant was not less liable to these suits before the agreement than after; therefore he merely promised what he was before liable to do, which was no consideration for a promise on the part of the plaintiff; *Harris v. Watson* (a). Now, if the plaintiff was not bound to perform his part of the agreement, the defendant could not be liable. [*Patteson J.* That proposition seems too broad. Suppose I say, if you will furnish goods to a third person I will guarantee the payment: there you are not bound to furnish them; yet, if you do furnish them in pursuance of the contract, you may sue me on my guarantee.] Here the contract could only be supported by a consideration perfect and definite at the time of the contract, and such, that the party from whom it moved was, at the time, made incapable of retracting. This is the only principle upon which the mutual promises can constitute a consideration; and it is confirmed by *East London Water Works Company v. Bailey* (b), *Mowse v. Edney* (c), and *Potter*

(a) *Peake*, N. P. C. 72. See Lord *Ellenborough's* remarks on this case, in *Stilk v. Myrick*, 6 *Esp.* 129. S. C. 2 *Campb.* 317.

(b) 4 *Bing.* 283. (c) 1 *Roll. Abr.* 20. *Action sur Ouse*, (V), pl. 12.

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v. Turnor (a). *Fenner v. Meares (b)* may be considered an authority the other way; but that case cannot be relied upon after Lord *Kenyon's* remarks in *Johnson v. Collings (c)*, and those of Lord *Ellenborough* in *Williams v. Everett (d)*. Further, the forbearance is no consideration, unless there was a good cause of action at the time of the contract. Now there was no legal cause of action between these parties. And, if the plaintiff rely upon his right to sue in equity, he lets in every equitable answer to the claim, as, for instance, a set off against the original obligee. But it is clear that no such set off would be allowed in this action; the forbearance of the equitable suit can therefore be no consideration here. [*Patteson J.* You must contend that the defendant could have a set off if the plaintiff proceeded in equity on the new agreement alone. For, if the proceeding were on the bond itself, the defendant would have a set off at law as much as in equity.] Further, this is an attempt to vary an instrument under seal by a parol agreement. The obligation of the bond itself could not be directly released by parol; neither, therefore, can this be effected indirectly, either wholly or in part; *Anonymous* case in *Cowper (e)*. It might be otherwise, if the contract sued on were to do something distinct from the obligation in the bond, as in *White v. Parkin (g)*. Again, if this were a good contract, the defendant would be liable to two actions on the same instrument; for there is nothing to prevent

(a) *Palm.* 185. *S. C. Winch.* 7. (b) 2 *W. Bl.* 1269.

(c) 1 *East*, 104.

(d) 14 *East*, 582. See p. 587. note (a).

(e) 1 *Cowp.* 128, 129.

(g) 12 *Eqst.* 578.

the original obligee, or an assignee of the present plaintiff, from suing the defendant on the bond at any time. [*Littledale J.* That would be an action for a different cause from this: that would be on the bond; this is on the parol contract.] The case of forbearance toward the heir of an obligee has been relied on; but an heir is to pay only if he has assets by descent. That raises a question to be determined by parol evidence. And, as the heir's liability is conditional, not absolute like that of the obligee, he may be supposed to promise to pay when he has assets, which creates a liability different from that of the party to the original bond.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*June 12th*), delivered the judgment of the Court.

This is a motion in arrest of judgment. The question is, whether forbearance for a given time on the part of the assignee of a bond to sue the obligors, is a good consideration for a promise by the obligors to pay the assignee at the expiration of that time, or give him a warrant of attorney for the amount.

It was objected that there is no mutuality in the agreement; for that, if the plaintiff had sued the defendants in the obligee's name, the promise to forbear would be no answer. Again, that this is a mere nudum pactum, being only a promise to do that which the defendants were already bound to do by their bond. And, further, that, if this promise be binding, it amounts to varying a deed by parol contract, which is contrary to the rule of law. We do not think any of these objections sufficient to arrest the judgment.

As to the first, there is sufficient mutuality; for, although

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though the agreement to forbear would not be pleadable to an action in the name of the obligee, yet, unless the plaintiff did forbear according to his agreement, he would not be able to sue on the defendant's promise. He is obliged to aver, as he does in the present declaration, that he has forborne, which is a condition precedent to his suing.

As to the second objection, this is not a mere nudum pactum, for the defendants promise to pay the plaintiff, a third person, whom they were not bound to pay by their bond; and they promise, in consideration of a detriment sustained by the plaintiff at their request, namely, a forbearance to enforce his right in the name of the obligee.

As to the third objection, the bond is in no respect varied by this agreement. The new contract entered into by the defendants with the plaintiff leaves the bond just as it was before: it was forfeited before the agreement, and so it remains; and the agreement would be no answer to an action on it.

The cases on this subject are collected in Mr. Serjeant Williams's notes to *Forth v. Stanton* (a), and to *Barber v. Fox* (b), to which may be added *Yard v. Eland* (c), and other cases collected in *Comyns's Digest, Action on the Case upon Assumpsit, Consideration*, (B). They are all in favour of the action lying, with the exception of *Potter v. Turnor* (d), which we think inconsistent, not only with the current of authorities, but with established principles.

(a) 1 *Wms. Saund.* 210. note (1).

(b) 2 *Wms. Saund.* 137. note (2).

(c) 1 *Lord Raym.* 368.

(d) *Palm.* 185. *S. C. Winch.* 7.

For

For these reasons, we are of opinion that the rule to arrest the judgment in this case must be discharged.

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Rule discharged.

In the Matter of PRATT.

Thursday,
May 25th.

J. J. WILLIAMS moved for a mandamus to the justices of *Berkshire* to enter continuances and hear the appeal of *Thomas Pratt*. He moved on affidavits containing a copy of a conviction (certified by the clerk of the peace, as to which he cited *Rex v. Mellor (a)*), by two justices of *Berkshire*, by which *Pratt* was convicted, for that he did commit a trespass, by unlawfully entering and unlawfully being in the daytime, &c., upon, certain land, the property of the President and Scholars of *Saint John Baptist College, Oxford*, situate &c., in search and pursuit of conies, contrary to the statute &c.; for which he was fined 2*l.* with costs, and to be imprisoned, in default of immediate payment, &c. The affidavits stated that an appeal against this conviction came on to be heard at the last *Easter* quarter sessions for *Berkshire*, when *Pratt* admitted the entering and being on the land, as in the conviction mentioned, but denied the property in the land as there laid, and offered such evidence as he would have been entitled to produce if an action of trespass had been brought against him; namely, evidence to shew that the land was not the property of the College, but was parcel

On appeal against a conviction for a trespass under stat. 1 & 2 W. 4. c. 32. s. 30., the appellant admitted the trespass, and offered only evidence that the property in the land was not as laid in the conviction. The sessions having rejected the evidence, and confirmed the conviction, without stating a case, this Court refused to call upon them by mandamus to hear the case, since the mistake, if any, was one of law, which this Court could not enter into, the appeal having in fact been heard, and no case sent up.

(a) 2 Dowl. P. C. 173.

1837. of a waste or common, in the hundred of *Horner* and
 In the Matter of manor of *Cumnor*, of which hundred and manor the
 PRATT. Earl of *Abingdon* was lord; that the Court refused to
 hear the evidence, confirmed the conviction, and de-
 clined to state a case; and that the appellant was wholly
 unheard in support of his appeal.

J. J. Williams now urged that, by stat. 1 & 2 *W.* 4.
c. 32. *s.* 30., under which this conviction took place,
Pratt was "at liberty to prove, by way of defence, any
 matter which would have been a defence to an action
 at law" for the trespass: and that a mandamus was
 the proper remedy for the omission to hear the appeal,
 the writ of certiorari being taken away by sect. 45.
 He cited the language of *Holroyd J.* in *Rex v. The*
Justices of Carnarvon (a); "If it had appeared in this
 case that the sessions had heard one side, and had
 altogether refused to hear the other, I should have
 thought it the same as if the case had not been heard
 at all, and I should then have been of opinion that this
 mandamus ought to issue."

LORD DENMAN C. J. The suggestion is, that the ses-
 sions were mistaken in point of law. If they had had
 any doubt, they would have sent a case: but they have
 not done so; and they have, in fact, heard the appeal.

LITLEDAL and PATTESON Js. concurred (*b*).

Rule refused (*c*).

(a) 4 *B. & Ald.* 88.

(b) *Williams J.* was absent. See p. 14. *antè*.

(c) See *Rex v. The Inhabitants of Frieston*, 5 *B. & Ad.* 597.; *Rex v. The Justices of Cumberland*, 4 *A. & E.* 695.

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BERKLEY *against* WATLING, NAVE, and CRISP. *Friday, May 26th.*

ASSUMPSIT. The declaration stated that the defendants, before and at &c., to wit 29th *April* 1835, were owners of a ship called the *Search*, then lying at *Great Yarmouth*, and bound to *Newcastle*, and that the plaintiff, at their request, caused to be shipped, in and upon the said ship, then lying as aforesaid &c., and bound &c., of which *John Blyth* was master for the then present voyage, divers goods, to wit 168 quarters of wheat, to be delivered at *Newcastle* to the plaintiff or his assigns, he or they paying freight; that defendants, in consideration &c., promised to deliver the goods at *Newcastle*, plaintiff or his assigns paying freight; that afterwards, to wit 1st *May* 1835, the ship departed from *Yarmouth* on the said voyage, and afterwards, to wit 11th *May* 1835, arrived at *Newcastle*; but defendants did not deliver, &c.

The defendant *Watling* pleaded separately non assumpsit. The two other defendants pleaded jointly.

1. Non assumpsit.
2. That the plaintiff did not cause the goods to be shipped in and upon the said vessel.
3. That the defendants did convey, &c.

On these pleas issues were joined.

On the trial before *Tindal C. J.*, at the Summer

produce evidence that the goods were not shipped in fact, and was not estopped by the bill of lading, supposing such estoppel to exist in general, inasmuch as the plaintiff could support his issue only by making *W.* his agent, and if *W.* was so, the plaintiff was cognisant, through him, of the fact.

Quære, whether, generally, a bill of lading be conclusive evidence of the shipment, as against the ship owner, in favour of a holder of the bill for value. *Semble*, per *Littledale J.*, that it is not.

Declaration, in assumpsit, stated that defendants *W.* and *N.* were owners of a ship; that, in consideration that plaintiff at their request shipped goods on board to be delivered to him, *W.* and *N.* promised to deliver: breach, non-delivery. *N.* pleaded separately, and traversed the shipment. On the trial, plaintiff produced a bill of lading, signed by the captain of the ship, transmitted to plaintiff by *W.*, stating the goods to be shipped by *W.*, to be delivered to plaintiff or his assigns. Proof also was given to shew that plaintiff held the bill for value. *W.* was the managing owner.

Held, that *N.* might pro-

assizes

1837. assizes for the town and county of *Newcastle*, 1835,
a verdict was found for the plaintiff, subject to the
opinion of this Court upon a case, which was sub-
stantially as follows

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The plaintiff was a corn factor, residing and carrying on business at *Newcastle*. The defendant *Watling* was, during the years 1833, 1834, and 1835, a merchant residing at *Great Yarmouth*; and, during that time, had several dealings with the plaintiff, in the way of consigning from *Yarmouth*, to the plaintiff at *Newcastle*, cargoes of corn for sale on commission. The ship *Search* had been engaged occasionally in bringing cargoes of corn from *Yarmouth* to *Newcastle*, from *Watling* to the plaintiff and other merchants and factors in *Newcastle* during those years: and, at the time of signing the bill of lading after mentioned, the three defendants were the owners of the *Search*, whereof *John Blyth* was the master, and *Watling* the managing owner at *Yarmouth*.

On 2nd *May* 1835, the plaintiff received a bill of lading for 168 quarters of wheat, signed by *Blyth*, then the master of the *Search*, lying at *Yarmouth*, and bound on a voyage to *Newcastle*, of which bill of lading the following is an extract.

Shipped, in good order and well conditioned, by *John Watling*, in and upon the good ship called the *Search*, whereof *John Blyth* is master, for this present voyage, and now lying in the port of *Great Yarmouth* and bound for *Newcastle*, 168 quarters of wheat, being marked " &c., "and are to be delivered in the like good order and well conditioned at the aforesaid port of *Newcastle*," "unto Mr. *John Berkley*, or to his assigns, he or they paying freight for the said goods, nine shillings" &c.

" In

"In witness whereof, the master or purser of the said ship hath affirmed to two bills of lading," &c. Dated *Great Yarmouth*, 29th *April* 1835.

This bill of lading was enclosed in a letter from *Watling* to the plaintiff, dated *Yarmouth*, 30th *April* 1835, of which the following is an extract:—"Anticipating that you can have no objection to the transhipment of the wheat per *Herring* to *Search*, I have done so, and annexed, or rather enclosed, you have the bill of lading. I have suffered more than once by wheat going to *Sunderland*, and think you will approve of this arrangement." "I should like to put 100 qrs. more on board, but you keep me short of money."

Watling, by a letter dated *Yarmouth*, 18th *April* 1835, had inclosed a bill of lading for the same 168 quarters of wheat, signed by the master of a vessel called the *Herring*, of which letter the following is an extract:—"The *Herring* is bound for *Sunderland* with some anchors: and I have put 168 quarters of wheat on board, as per annexed bill of lading, which you will please insure for 350*l.*, and remit me a similar amount by return." In answer to which, the plaintiff sent *Watling* 200*l.*, as an advance on the wheat mentioned in the bill of lading, by a letter dated 22d *April* 1835, which *Watling* received. Subsequently, *Watling* wrote and sent to the plaintiff a letter, dated 25th *April* 1835, in which he acknowledged the receipt of 200*l.*, observing, however, that it should have been another hundred; and added, "I will endeavour to get the *Herring* to go to your quay." Also a second letter of 27th of *April* 1835, in which he said, "The *Herring* will not go to your quay; and, as *Sunderland* is likely to prove

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prove a losing market, I purpose, with your permission, to reship the wheat into the *Search*, or some other vessel, and do hope this will meet your approbation. The insurance can be transferred. Waiting your reply, I remain" &c.

On the 2d of *May* the plaintiff wrote, and sent to *Watling*, a letter of which the following is an extract:—
"Your wheat I think will come to a good market, as we have an advance to day; you never had reason to complain of my remittances, but you have frightened me on many occasions; and the delay in your shipments, after bill of lading, annoys me. Of course my capital is limited and not large: the times have not enabled me either to increase it: but, if you will not deprive me of confidence in the shipping documents, and dispatch your shipments with promptitude, I will let you be very little money out in your consignments to me."

The *Search* afterwards sailed from *Yarmouth*, and arrived at *Newcastle* without the wheat; in consequence whereof the plaintiff, by letter dated 20th *May* 1835, applied to the defendant *Nave*, as follows:— "Mr. *James Nave*. As one of the owners of the ship *Search*, I have to require of you the value of 168 quarters of wheat, shipped therein according to bill of lading to my order, dated the 29th of *April*, the vessel having arrived here without the wheat."

An answer, of which the following is an extract, was sent by defendants' attorneys, dated *May* 27th:—
"Sir,— Mr. *Nave* has handed to us your letter, to which he has requested us to reply. As Mr. *Watling*, who was the ship's husband for the *Search*, has left the town, we have to request that you will send the bill of lading

lading to some one of your correspondents here, in order that we may have an opportunity of inspecting the same. We are &c., *Reynolds and Palmer*."

The plaintiff wrote also on the 20th of *May* 1835 to Mr. *G. D. Palmer*, owner of the *Herring*, as follows:—"Sir, — As owner of the *Herring*, I have to require of you the value of 168 quarters of wheat, shipped by Mr. *J. Watling* of *Yarmouth*, according to bill of lading transmitted to me, and dated 18th of *April*, this vessel not having delivered the same."

The corn, if delivered at *Newcastle* by the *Search*, would have been of the value of 360*l*. *Watling* was, and still is, indebted to the plaintiff, over and above the 200*l*. advanced as aforesaid, in the sum of 72*l*. 16*s*. 5*d*.

On the part of the defendants *Nave* and *Crisp*, evidence was offered to shew that, although the master signed the bill of lading for the corn as aforesaid, yet no part of the corn was shipped on board of the *Search*, as therein expressed. This evidence was objected to on the part of the plaintiff, but was received, the question as to its admissibility to be a question in this case. (The case then stated parol evidence given to the above effect.) If the Court should think that the evidence was not admissible, the case was to be considered as if such evidence had not been stated.

The question for the opinion of the Court was, whether the plaintiff was entitled to recover?

W. H. Watson for the plaintiff. The question is, whether, when a bill of lading is handed over for value, the ship-owner can say that the goods were not shipped which the bill asserts to have been shipped. In *Howard*

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v. *Tucker*

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v. *Tucker* (a) it was held that, where a bill of lading had been indorsed over for value, the ship-owners could not deny, as against the indorsee, that freight had been paid; as stated in the bill. In *Bates v. Todd* (b) *Tindal* C. J. held that a bill of lading was not conclusive as between the actual shipper and the ship-owner: but here the plaintiff is a holder for value; and to admit the evidence would be like admitting proof of want of original consideration against a bonâ fide holder of a bill of exchange. The effect of the trans-shipment from the *Herring* to the *Search* can make no difference: it is analogous, merely, to the substitution of one bill of exchange for another. The plaintiff, perhaps, acted improperly in writing to the owner of the *Herring*; but that cannot prevent his being a holder of the bill of lading of the *Search* for value. By the bill of lading the captain admits the shipment and engages to convey. If it be argued that the captain is agent for the ship-owners only after the actual shipment, and that he is not authorised to sign the bill of lading till that has taken place, the answer is, that the acts of a general agent, exceeding the authority, bind the principal, though the acts of a particular agent do not; *Paley's Prin. and Ag.* 162. (3d ed.). It is like an indorsement by an agent who has a general authority to indorse from time to time; that binds the principal, though made, in the particular instance, contrary to his order. Now the captain is a general agent. If he sign a bill of lading for particular goods, he binds the owner: the way to avoid this is to add "contents

(a) 1 B. & Ad. 712.

(b) 1 Moo. & R. 106.

unknown;" *Abbott on Shipping*, 217 (5th ed.). The Court will uphold the negotiability of bills of lading. It is the constant practice to send them before the goods arrive: and the receipt of them authorises the factor, by the common law, to sell them, and, by stat. 6 G. 4. c. 94., to pledge. The transferee of the bill is owner of the goods, to all intents, as is laid down by Buller J. in *Lickbarrow v. Mason* (a). [*Patteson J.* Is there any instance of an action by a consignee of a bill of lading before the actual delivery of the goods? With whom is the contract?] The consignee is the party to enforce the contract against the ship-owners. [*Patteson J.* That seems not to be so: in *Moore v. Wilson* (b) it was held no variance to describe, in a declaration, the freight as payable by the consignor, though in fact payable by the consignee.] In *Sargent v. Morris* (c), where the goods, by the bill of lading, were to be delivered to the consignor, and, in his name, to the consignee, it was held that an action for damage to the goods should, on the special form of the contract, be brought by the consignor, the consignee being there merely an agent; but, in general, the consignee sues. [*Patteson J.* That is after a delivery, which vests the property.] Perhaps no instance of an action by the consignee before delivery is reported: but the bill of lading always represents the property; and advances are made on it. [*Patteson J.* This is *assumpsit*: what contract is there between the ship-owner and the assignee of the bill of lading? Is there any instance of a mere indorsee suing the ship-owner?] As to the effect of an acknowledgment made to the party to whom

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(a) 6 East, 22, note.

(b) 1 T. R. 659.

(c) 3 B. & Ald. 277.

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the goods are transferred, *Hawes v. Watson* (a) is an authority for the plaintiff.

Wightman, contra, for the defendants *Nave* and *Crisp*. If the statement in the bill of lading had led to any act changing the situation of the parties, perhaps it might have bound the parties to the bill (b). But, generally, such an admission is not conclusive: even a receipt is not so; *Graves v. Key* (c), *Skaife v. Jackson* (d). [Lord Denman C. J. A receipt is not a negotiable instrument.] The negotiability could not make the bill of lading conclusive, where the situation of the parties was not changed. In *Howard v. Tucker* (e) Lord Tenterden, at nisi prius, pointed out that the indorsees of the bill of lading had probably, in consequence of the statement in it that the freight was paid, received it at a value which they would otherwise have thought inadequate. *Bates v. Todd* (g) shews that the bill is not conclusive between the consignor and the ship-owner: if it be not in all cases conclusive, then the question must be, in each instance, as to the effect it has had in changing the situation of parties. There is no instance of an action where there has actually been no shipment; it was suggested hypothetically in the earlier judgment of Buller J. in *Lickbarrow v. Mason* (h), where it is said that the consignee might sue the captain for his fraud. Here the attempt is to make the innocent ship-owners liable. The advance is made on the bill of lading of the *Herring*: *Watling* may be liable

(a) 2 B. & C. 540.

(b) See the judgment in *Pickard v. Sears*, 6 A. & E. 474.

(c) 3 B. & Ad. 313.

(d) 3 B. & C. 421.

(e) 1 B. & Ad. 712.

(g) 1 Moo. & R. 106.

(h) 2 T. R. 75, 76.

for

for not sending the corn; but that does not affect the ship-owners. No change in the situation of the parties results from the bill of lading of the *Search*. The argument on the other side would indeed apply with more force against the owners of the *Herring*. [*Patteson* J. Suppose the consignor had brought the action, how could the bill of lading be conclusive in his favour? The fact would be within his own knowledge. Then, how does the present plaintiff become a party, except by making *Watling* his agent?] That objection is conclusive; the defendants are sued only as ship-owners by the party who puts himself in the place of consignor.

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W. H. Watson, in reply. *Dutton v. Solomonson* (a) and *Browne v. Hodgson* (b) shew that the property would be in the plaintiff immediately on the shipping. He held the bill for value. It is scarcely disputed that the owners of the *Herring* would, in the original state of things, have been liable for not delivering. Then the plaintiff, having assented to the substituted contract, loses the right against them, but acquires one against the owners of the *Search*. The negotiability of the bill of lading appears from *Abbott on Shipping*, 383 (5th ed.). [*Littledale* J. But your argument fails in this, that, whatever estoppel may exist generally against ship-owners, here *Watling* stands in a double capacity: he is agent to the plaintiff.] He is shipper as well as owner: and the presumption of his performance of the duty of shipping the goods is the stronger. It does not, however, appear that the plaintiff knew *Watling* to be an owner. It is a case of consignor and consignee, not of principal and agent.

(a) 3 B. & P. 582.

(b) 2 Campb. 36.

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LORD DENMAN C. J. The argument for the plaintiff is that the defendants, *Nave* and *Crisp*, are not entitled to disprove the shipment, because the bill of lading, signed by *Blyth* and transmitted by *Watling*, asserts the shipment. I think the evidence was admissible. The plaintiff was to prove that he had shipped the goods. This he could do only by proving that *Watling* was his agent, although the partner of the other two defendants. There is therefore nothing to prevent the defendants, *Nave* and *Crisp*, from shewing that what the bill of lading asserted to have been done was in fact not done. This view of the case makes it unnecessary for us to determine the point which has been raised as to the extent and consequences of the negotiability.

LITLEDALE J. I am of the same opinion. The statement in the declaration is that the plaintiff caused the goods to be shipped, which is put in issue by the second plea. Then how does the plaintiff prove his allegation? He puts in a bill of lading, which certainly appears to be signed by the master; but, on the face of it, the goods are shipped by *Watling*. Then the plaintiff must prove *Watling* to be his agent: by doing so, he supports the allegation. It turns out that in fact the goods were not shipped on board the *Search* at all. But the plaintiff says that the defendants, *Nave* and *Crisp*, are estopped from shewing this, by the bill of lading signed by their own agent. How are they estopped? *Watling* knew the fact, and his knowledge is the plaintiff's knowledge. The plaintiff knowing the fact by *Watling*, his agent, how are the defendants, *Nave* and *Crisp*, estopped by what *Watling* does as their agent? Since, therefore, the plaintiff, as shipper, is cognizant of the facts, we need
not

not say how far, on the general question, there is an estoppel. But, in my opinion, the bill of lading is not conclusive.

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PATTESON J. This is an action by the consignee in a bill of lading, not an indorsee. That makes a difference; though I recollect no instance of such an action being brought by an indorsee. If any such were brought, the plaintiff would have to state the original contract and the indorsement. Here that is not done. Nor does the declaration state the plaintiff to be consignee of goods shipped by another person, but that he, *the plaintiff*, caused to be shipped. If he did so, then the party who is shipper on the face of the instrument is the plaintiff's agent. Had the statement been that *Watling* had caused to be shipped, the case might have assumed a very different aspect. But, as it now stands, is the bill of lading to be conclusive between the plaintiff and the two other defendants? It is impossible so to hold, for the reasons already given by my Lord and my brother *Littledale*. This decision will not affect any question which may arise hereafter, as to the conclusiveness of a bill of lading between a ship-owner and an indorsee for value. I should be sorry to destroy the negotiability of the instrument. But the plaintiff is here the shipper in effect, and sues as shipper; and the bill of lading, made out by his agent, is not conclusive between him and the defendants *Nave* and *Crisp*.

Judgment for the defendants (a).

(a) *Williams J.* was absent. See p. 14. *antè*.

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HOLLINGWORTH *against* BRODRICK.

To a declaration by assured against underwriter of a policy on ship, at and from any port or ports, for twelve months, alleging loss by perils of the seas, defendant pleaded that, during the time for which the ship was insured, and before the loss, she was damaged and unseaworthy, but, by reasonable care, and at small cost, compared with her value, she might and ought to have been repaired and rendered seaworthy; yet plaintiff, well knowing the premises, did not repair and render her seaworthy, but neglected, &c., and she remained in such unseaworthy

state till the loss. Demurrer, because it was not stated that the non-repair caused the loss.

Quære, whether, in an action as above, it would be a defence that, after the commencement of the risk, the ship by actual default on the part of the assured, shewing gross negligence, became unseaworthy and was lost? But,

Held that, at all events, this plea was bad, as it did not sufficiently aver knowledge by the assured that the ship was unseaworthy, and might have been repaired before the loss; nor did it shew that he could in fact, if not grossly negligent, have repaired before the loss; or that the loss was occasioned by his alleged default.

Per Patteson J. The implied warranty of seaworthiness on the part of the assured, refers to the commencement of the risk: the only exception is, where pilots, or a particular description of crew, are necessary in certain parts of the voyage. There is no difference, as to such implied warranty, between time policies and others.

ASSUMPSIT on a policy of insurance, "lost or not lost, at and from any port or ports, place or places whatsoever and wheresoever for and during the term of twelve calendar months commencing the 1st day of *March* 1834, upon any kind of goods and merchandizes, and also upon the body," &c., of the ship *Angerstein*. The list of perils insured against was in the common form, with an addition not material here. The declaration stated that, "during the said twelve calendar months, and whilst the said ship was attempting to prosecute a voyage which was protected by the said policy, to wit on" &c., "the said ship was, by the perils and dangers of the seas, and by stormy and tempestuous weather, and the violence of the winds and waves, broken, damaged, spoiled, and destroyed, and the said ship thereby became and was wholly lost to the said plaintiff."

Third plea. "That, after the making of the said policy in the said declaration mentioned, and during the said time the said ship or vessel was insured as therein mentioned, and before the loss in the said declaration mentioned, the said ship or vessel was greatly

broken,

broken, damaged, shattered, loosened, and unseaworthy; but the same, by and with reasonable care and diligence in that behalf, and at and for a very small cost and sum as compared with the value of the said ship or vessel, might, and could, and ought to have been by the said plaintiff repaired, amended, and rendered seaworthy: yet the said plaintiff, well knowing the premises, did not nor would repair, amend, and render the said ship or vessel seaworthy, but wholly neglected and refused so to do; and she so remained and continued in such unseaworthy state and condition until the time of the loss in the said declaration mentioned." Verification.

Demurrer, assigning for cause that it is not averred in the plea that the loss in the declaration mentioned was in anywise caused by reason of the plaintiff's not repairing, amending, or rendering the said ship seaworthy. Joinder.

Martin, for the plaintiff. The plea does not allege that the loss was caused by unseaworthiness. And there is no breach of the implied warranty of seaworthiness, if the ship was seaworthy at the commencement of the voyage; per Lord *Mansfield* in *Eden v. Parkinson* (a), and in *Bermon v. Woodbridge* (b); per Lord *Eldon* in *Watson v. Clark* (c). Nothing more is required of the assured in this respect in the case of a time policy than in other instances. The plea here only alleges that the ship was unseaworthy during the time covered by the policy, and before the loss. [*Patteson J.* Non constat that she did not become so by some of the perils insured against.] But, further, the plea in its

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(a) 2 Doug. 735.

(b) 2 Doug. 789.

(c) 1 Dow. 344.

1837. commencement admits a partial loss before the total loss; and a plaintiff declaring for a total loss may recover for a partial one; note (18) to *Goram v. Sweeting* (a). The plea, therefore, does not, at any rate, answer the whole action. Lastly, the plea states that the ship might and ought to have been rendered seaworthy by the plaintiff, but it does not shew any duty incumbent on him to make her so. The question, what might have been done for the ship on the part of the assured, is sometimes material in determining whether he shall recover for a total or a partial loss, but cannot legitimately be raised here.

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R. V. Richards, contra. The claim for a partial loss is inconsistent with the description of the loss in the declaration, and cannot be grounded on the averment in the plea which has been relied upon. As to the causes of loss: this is a time policy; and, in the case of such a policy, not only is it necessary that the vessel should be seaworthy when the adventure commences, but the assured must keep her in a state of seaworthiness while the risk is running. And, if that is a part of his contract, and is broken, and the underwriters, in consequence, refuse to make his loss good, he cannot allege that the want of seaworthiness was not the cause of the loss. Under any policy, the assured is bound to use reasonable care and diligence in the repair and preservation of the ship. If a damage happens by a peril insured against while the ship is off a port, it is the master's duty to put into the port, if requisite, for the purpose of repair. If sails are carried away, can it be

(a) 2 *Wms. Saund.* 203.

said

said that he is not bound to replace them, if there are new ones actually in the hold? Whether the means of repair were attainable or not would be a question of fact in each particular case. In *Law v. Hollingsworth (a)*, which was an action on a policy from *Stettin* to *London*, the ship was lost in the *Thames*, by an accident which happened before she came to her moorings, there being, at the time, no pilot on board. It was not known what particular default caused the loss. The Court held that the plaintiff must be nonsuited; Lord *Kenyon* observing that "the assured cannot recover on a policy of assurance, unless they equip the ship with every thing necessary to her navigation during the voyage; the ship herself must be seaworthy, she must have a sufficient crew, and a captain and pilot of competent skill." "The captain did not perform his duty; for he had no pilot on board at the time when the accident happened; and it is one of the things implied in contracts of this kind that there shall be some person on board the ship apparently qualified to navigate her. If the underwriters had been previously informed that there would be no pilot on board during the ship's sailing up the river *Thames*, probably they would not have undertaken the risk." And *Lawrence J.* said, "In this case there was gross negligence in the captain, in having no person on board to take care of the ship, and on that ground I think the plaintiff cannot recover." Yet there it does not appear that the ship was not seaworthy at *Stettin*; the policy, therefore, had attached at the commencement of the voyage; and, consequently, it is incorrect to say that, if the vessel is seaworthy at first, the claim of the assured cannot be

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(a) 7 T. R. 160.

defeated

1837. defeated by any neglect afterwards. He is bound, during the whole voyage, as far as lies in him, to keep the vessel seaworthy according to the exigencies of each part of the voyage. If a portion of the crew depart, he must endeavour to replace them; if a pilot is any where necessary, he must endeavour to procure one; and the obligation as to needful repairs is upon the same footing. He has no right, by any negligent omission of his, to increase the liability originally placed upon the underwriter. [*Patteson J.* In *Law v. Hollingsworth* (a) there was an intermediate voyage, if I may so say, constituted by act of parliament, upon which voyage the vessel was not seaworthy unless she had a pilot. The case is quite different from the others which you are putting.] It would be equally applicable, if the omission to take a pilot had happened in going, for instance, up the *Elbe* to *Hamburgh*, where the statute regulations would have no force (b).

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Martin, in reply. Supposing *Law v. Hollingsworth* (a) were applicable, it is answered by the subsequent cases of *Busk v. The Royal Exchange Assurance Company* (c), and *Bishop v. Pentland* (d), in which it was held that, when the assured has once provided a sufficient crew, he is not answerable for a subsequent loss, occasioned, proximately, by a peril insured against, though ultimately by neglect in the crew. Such neglect is part of the risk insured against by the assured, who cannot control the master and crew. According to the ar-

(a) 7 T. R. 160.

(b) See the judgment of *Parke J.* in *Phillips v. Headlam*, 2 B. & Ald. 383.

(c) 2 B. & Ald. 73.

(d) 7 B. & C. 219.

gument

gument for the defendant, reasonable care is a condition precedent to recovery, though for a loss not occasioned by the want of such care. [Lord *Denman* C. J. Do you say that gross negligence during the voyage will not in any case preclude the assured from recovering? Suppose there were a leak which might be stopped by the most simple application, and yet, if that were neglected, the ship would go down directly.] In *Busk v. The Royal Exchange Assurance Company* (a) the negligence was very great; no one was left on board the ship when she took fire. The result of the cases is, that the warranty of the assured is fulfilled, or not, at the commencement of the voyage. [*Patteson* J. It is to be fulfilled so far as it can be then. In the case of taking a pilot, as in *Law v. Hollingsworth* (b), it cannot.] As to the observation that this is a time voyage, the warranty, in such a case, cannot be carried farther than by making it attach upon every voyage commenced during the time. Here the declaration states a loss during a voyage so commenced and protected by the policy; the answer is, in substance, that the vessel had become unseaworthy, not before the commencement of the voyage, but before the loss.

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LORD DENMAN C. J. The defence of unseaworthiness is generally applied to the time when the risk commenced; that is not done here, nor is the loss stated to have happened in consequence of the unseaworthiness supervening. I own I feel a doubt, whether, if it were distinctly averred that the ship had by gross negligence been brought, during the voyage, to a condition in

(a) 2 B. & Ald. 73.

(b) 7 T. R. 160.

which

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 ———
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which she would not be insurable, that might not be a defence. It is certainly a new, and perhaps a dangerous one; but I think that, if it were clearly made out, the assured could not say that the loss was by perils insured against. The case, however, is not such here. [His Lordship then read the plea.] In the first place, it is not distinctly averred that the plaintiff knew the precise danger, for the words "well knowing the premises" do not amount to such an averment. And, secondly, it is not said that, but for gross negligence, the ship might have been restored to a seaworthy state before the loss actually happened. The averment, that with "reasonable care" the ship might have been repaired and rendered seaworthy, does not shew that there was gross negligence in not doing it. Therefore, even supposing the law to be as I at first suggested (which I have some doubt of, from the novelty and dangerous nature of the defence), it cannot apply here; and the plaintiff is entitled to judgment.

LITLEDALE J. The party insuring a ship impliedly warrants that she is seaworthy at the commencement of the voyage. If she becomes unseaworthy soon after, that may be a ground for inquiring whether she actually was seaworthy at the commencement (*a*). I do not say whether her becoming unseaworthy soon after the commencement of the risk would or would not be a good defence for the underwriter if the assured failed to shew that the loss was owing to such want of seaworthiness. The plea here alleges that the ship, during the time of the risk, and before the loss, "was greatly broken, damaged, shattered, loosened, and

(*a*) *Watson v. Clark*, 1 Dow. 336.

unseaworthy." The last word here is the only one deserving attention, because the others may be applied, in pleading, to any damage, however slight. It is further stated that she might have been repaired and rendered seaworthy by the plaintiff at a very small cost; but it is not alleged that he knew this. "Well knowing the premises" is not sufficient. Then it only appears that the ship, after the commencement of the risk, became unseaworthy without the knowledge of the captain or owner; and that she was lost by some cause which may have been as little connected with the unseaworthiness as if she had been captured. It is contended that, this being a time policy, the ship was to be kept seaworthy for the whole time. But that does not follow. This is a policy for a year. Many vessels are insured for voyages which will last longer; but the implied warranty as to them is only that they are seaworthy, at the commencement, for the voyage insured.

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PATTESON J. The defence is put entirely upon the fact that the ship, during the voyage, "was unseaworthy." It is not stated that she became so through neglect to repair from time to time, and that that occasioned the loss. I do not know that that would have been a defence. But it is only said that by some means the ship was greatly damaged. It is clear that the implied warranty of seaworthiness is satisfied if the ship is seaworthy at the commencement of the risk. I do not know of any distinction on account of the risk being for time. Unseaworthiness for want of a particular description of crew is an exception to the rule, because one crew may be necessary in one part of the voyage, and another in another. That case is different from the

case

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case of unseaworthiness owing to something in the condition of the vessel. Even if it could be contended that a default of the owner, after the commencement of the voyage, might be set up in the manner here attempted, I should say that the loss ought to be traced to that, because the defence is no longer rested on the implied warranty, but on something actually done by the owner. Here, the endeavour is to make the implied warranty extend to every period of the voyage where the owner could do any thing for the ship, making him responsible even though the loss be not caused by his omitting any of those things. There is no authority for such a position. The plea is loosely drawn, even according to the defendant's view of the case. It should have stated that the plaintiff was aware of the unseaworthiness, and that there was time for repairing before the loss happened: and, supposing that, in the case of a time policy, the assured were held to a warranty of seaworthiness, at the commencement of each voyage during the time, the allegations should have been shaped accordingly. But I wish to go upon the broad ground, that no warranty of seaworthiness is to be implied, except at the commencement of the voyage (a).

Judgment for the plaintiff (b).

(a) *Williams J.* was absent. See p. 14., *antè*.

(b) See *Shaw v. Robberds*, 6 A. & E. 75.

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MECHELEN *against* ELIZA WALLACE.*Friday,
May 6th.*

ASSUMPSIT. The declaration stated that whereas before and at the time of the making of the promise &c., the plaintiff was desirous and intended to hire and take as tenant a furnished house and premises suited for the convenient accommodation and reception of the plaintiff and his family, and of divers, to wit &c., female scholars and boarders, in order that a school, consisting of such number of boarders and scholars, might be carried on in and upon such furnished house and premises by the plaintiff's wife; of which desire and intention the defendant, before and at the time &c., had notice:—"And whereas, also, the defendant at the same time was possessed of a certain house and premises in part furnished, and was desirous that the plaintiff should take and hire, at a certain rent, viz. 170*l.* per annum, the same house and premises, with the said furniture and all other furniture necessary for the completely furnishing the same for the purpose aforesaid; and thereupon, to wit on the 14th day of *May*, A. D. 1835, in consideration that the plaintiff, at the request of the defendant, would take possession of the same house and premises so partly furnished as aforesaid, and would, if the furniture necessary for the completely furnishing the said house and premises for the purpose aforesaid should be sent into the said house and premises by the defendant within a reasonable time, become the tenant to the

Declaration stated that defendant wished plaintiff to hire of her a house, and furniture for the same, at the rent of &c.; and thereupon, in consideration that plaintiff would take possession of the said house partly furnished, and would, if complete furniture were sent into the said house by defendant in a reasonable time, become tenant to defendant of the said house, with all the said furniture, at the aforesaid rent, and pay the same quarterly from a certain day, to wit &c., defendant promised plaintiff to send into the said house, within a reasonable time after plaintiff's taking possession, all the furniture necessary, &c.

Held, that the defendant's agreement to

send in furniture was an inseparable part of a contract for an interest in lands, and therefore came within stat. 29 *Car.* 2. c. 3. s. 4., which, in the case of such contract, requires the agreement, or a memorandum thereof, to be in writing.

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defendant

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defendant of the said house and premises, with all the furniture aforesaid, at the rent aforesaid, and pay the same rent quarterly, commencing from a certain day then in that behalf agreed upon, to wit the 25th day of the said month of *May*, the defendant promised the plaintiff that she the defendant would, within a reasonable time after the plaintiff should have so taken possession of the same house and premises, send into the said house and premises all the furniture necessary for the completing of the furnishing of the said house with furniture, of good quality, and suited for the purpose aforesaid, to wit" &c. (describing the furniture to be sent in). The declaration then stated that plaintiff, relying &c., did, on *May* 25th, at defendant's request, take possession of the said house and premises so partly furnished, and remained in possession of the same until the expiration of such reasonable time, &c., to wit &c. And, although plaintiff would have become tenant as aforesaid, and paid rent as aforesaid, if defendant would have sent in such furniture as aforesaid within such reasonable time as aforesaid; and although such reasonable time elapsed long before the commencement of this suit, and plaintiff, during such reasonable time, to wit &c., requested defendant to send in such furniture; and although defendant did, during such reasonable time, to wit on &c., send into the said house and premises divers, to wit twenty, articles of furniture; yet &c., Breach, that the articles so sent in were not of good quality, nor suited for the purpose aforesaid; but on the contrary &c.: and, further, that defendant did not, within such reasonable time, &c., send into the said house and premises all the furniture necessary to complete the furnishing, &c., but neglected &c., and a great part, to wit

wit three fourths of the furniture necessary &c., never was sent in: by means whereof the said house and premises were and remained insufficiently furnished and unfit for the purposes aforesaid, and plaintiff was thereby prevented from having in the said house and premises such school as aforesaid, &c.: alleging damage in various other ways.

Second plea, that the promise in the declaration mentioned was and is part and parcel of a contract made by and between plaintiff and defendant concerning the said tenement, and the interest relating to the same, as in the said declaration appears; and that neither the said contract nor any memorandum or note thereof was or is in writing signed by defendant, or any other person thereunto by her lawfully authorised. Verification.

Demurrer, assigning for cause, among others, that the promise, as it appears by the declaration, is a promise relating only to personal chattels, and that the agreement to take possession of the said house and premises, and further to do as in the declaration is mentioned, is not the contract on which the action is brought, but the consideration of defendant's promise; and such contract, as appears in the declaration, has been performed, and is sufficient as a consideration without writing. Joinder in demurrer.

John Henderson for the plaintiff. The fourth section of the Statute of Frauds, 29 Car. 2. c. 3., is not available in this case. Where there is an entire contract to do several things, some of which are within the statute, it applies to the whole; but here the promise declared upon is separate and single, and relates to personal

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chattels only; the statute, therefore, does not take effect. This distinction is supported by *The Earl of Falmouth v. Thomas* (a), where the statute was held to apply, because the land and the other subjects of contract were so incorporated together as to be inseparable. In *Chater v. Beckett* (b), and *Thomas v. Williams* (c), where contracts, subject to the statute as to one of the matters promised, were held to be so altogether, the promises within and those not within the statute were indivisible. And in *Wood v. Benson* (d), where those decisions were recognised, it was observed by Lord Lyndhurst C. B., and Bayley B., that in those cases an entire contract was set out in the declaration, but the proof failed as to a portion of it, by reason of the statute; consequently there was a variance. In *Mayfield v. Wadsley* (e), where there was a contract for the interest in a farm, and for growing crops, and likewise for dead stock, it was held that the bargain for dead stock, being distinct from the rest of the contract, was not affected by the statute. There it was contended (and a like suggestion may be made here) that the agreement for dead stock was subsidiary to the contract for the interest in land; but the argument did not prevail. In the present case, however, there is only one subject-matter of contract in question. The defendant engages to send the plaintiff furniture for a house. It is immaterial for the present purpose, whether the furniture was to be supplied for a house or for a ship. Supposing that the word "contract," in the fourth section of the statute, means (like "agreement") the consideration as well as the promise,

(a) 1 Cro. & M. 89. S. C. 3 Tyr. 26. (b) 7 T. R. 201

(c) 10 B. & C. 664.

(d) 2 Tyr. 93. S. C. 2 Cro. & J. 94. (e) 3 B. & C. 357.

which

which is rendered doubtful by the comments on sect. 17 in *Egerton v. Mathews* (a), still the plaintiff here is not seeking to charge the defendant with any "contract or sale of lands, tenements or hereditaments, or any interest in or concerning them;" but only with a contract to deliver furniture. The "agreement," therefore, is not required to be in writing. It is true that the consideration for the defendant's contract was the taking of a house by the plaintiff; but that may have been a good consideration, though the contract for such taking was not testified by writing so that, according to the statute, an action could have been brought upon it. The consideration was executed by the plaintiff's taking possession: and it is not to be presumed on these pleadings that he did not sign an agreement for becoming tenant. [*Patteson* J. referred to *Harvey v. Graham* (b), and Lord *Denman* C. J. to *Head v. Baldrey* (c).]

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Maule, contra. The enactment in sect. 4 of the Statute of Frauds is, that no action shall be brought to charge any person upon any contract or sale of lands, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum thereof, shall be in writing, &c. It manifestly treats "agreement" and "contract" as equivalent; and the question here is, whether the agreement, or contract, upon which it is sought to charge the defendant, be for lands or any interest in or concerning them. The general rule is, that a contract is entire, and not to be separated; the cases in which the application of that rule fails are where there are two con-

(a) 6 *East*, 307.(b) 5 *A. & E.* 61.(c) 6 *A. & E.* 459.

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tracts, not one. That was the ground of decision in *Mayfield v. Wadsley (a)*. It cannot be said here that there was one contract that the defendant should send in furniture, another that the plaintiff should become tenant. In the former case of *Mechelen v. Wallace (b)* it

(a) 3 B. & C. 357.

(b) MECHELEN against ELIZA WALLACE.

Saturday,
April 16th,
1836.

M. agreed verbally with *W.*'s agent to take a house of *W.*, furnished, at 170*l.* a year rent, for the house and furniture, payable quarterly, and in advance. The house was furnished only in part, but the agent said that it should be completely furnished; not, however, specifying any time. *M.* was let into possession within a month from the above treaty. After the expiration of a quarter, *W.* distrained for rent, the furniture not having been sent in as promised. *M.* brought trespass.

Held, that it was a question for the jury whether the

agreement to pay rent was absolute, or on condition only of the furniture being sent in: that there was evidence upon which they might find it to have been conditional: and, therefore, that the distress was not justified.

TRESPASS for taking plaintiff's goods. Plea, Not guilty. On the trial before Alderson B. at the Gloucester Spring assizes, 1836, it appeared that, the defendant having a house to let, the plaintiff, in May 1835, entered into a negotiation with one Wood, the defendant's agent, for taking it; and it was agreed verbally between Wood and the plaintiff that the latter should rent the house, furnished, and pay, for the house and furniture, 170*l.* a year, by quarterly payments, to be made in advance. At the time of this treaty the house was furnished in part only, but the agent said that it should be furnished completely, in a manner suitable to a lady's school. No time was fixed at which the furnishing was to be completed. The plaintiff entered on the 25th of May. The furniture was never put in. After the plaintiff had entered, a written agreement was tendered for his signature; but he (by letter to the agent) replied that he declined executing an agreement for a house which was not furnished, complained that furniture had not been sent in, and stated that he had relied upon the honour of Wood for this being performed. In September 1835, the defendant distrained for 42*l.* 10*s.* The learned Judge left it to the jury to say, whether the payment of rent, as above stated, had been agreed for between the plaintiff and defendant absolutely, or on condition, only, of the house being properly furnished; and, in the latter case, whether or not the defendant had broken the condition. Verdict for the plaintiff.

Talfourd Serjt. now moved for a new trial, on the grounds that the jury were misdirected, and that the verdict was against evidence. The agreement for taking the premises and paying 170*l.* rent was a complete bargain; there was a time fixed from which the rent was to run, and the plaintiff had taken actual possession. The stipulation for furnishing, if it rested on any thing more than the honour of Wood (which the plaintiff appears by his letter to have relied upon), could, at most, be only the subject of a cross action. If this were otherwise, the defendant's claim of

rent

it was expressly held that the undertakings of the respective parties could not be separated. There is one contract, to do several things, a part of which is within the statute. It is not necessary that the breaches alleged should relate to that part. The argument of the defendant's counsel in *Chater v. Beckett* (a) (where *Lord Lexington v. Clarke* (b) was cited), and the judgments of

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rent might be answered as long as a single chair or table was not perfectly completed and sent in. There was no evidence that the agreement for rent was intended to be conditional. *Regnart v. Porter*, 7 Bing. 451., was cited for the plaintiff at the trial; but there the rent was to commence at a future day, and the works engaged for by the landlord were to be done immediately; the performance of these, therefore, might justly be regarded as a condition precedent in point of time. In note (4) to *Pordage v. Cole*, 1 Wms. Saund. 320 a, Mr. Serjt. Williams lays it down that, "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or may happen, before the thing which is the consideration of the money, or other act, is to be performed, an action may be brought for the money, or for not doing such other act before performance; for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent: and so it is where no time is fixed for performance of that, which is the consideration of the money or other act:" and many authorities are cited.

LORD DENMAN C. J. If the performance of the furnishing was not left to the defendant's honour, the stipulation respecting it is part of the agreement. The observation upon it in the letter to *Wood* is only reproach to him. In my opinion there was evidence that the payment of rent was intended to be conditional; the house to be rented was to be a furnished house and no other.

PATTERSON J. I do not see how the contracts for rent and for furnishing can be separated. I think, with my Lord, that there was evidence of the agreement being conditional.

COLERIDGE J. concurred.

(LITLEDAL J. was absent.)

Rule refused.

(a) 7 T. R. 203.

(b) 2 Ventr. 223.

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 ———
 MECHLEN
 against
 WALLACE.

Lord *Kenyon* and *Grose J.*, who held that an agreement void in part by the statute could not be severed, apply strongly to this case. Supposing, here, that the promise to take the house were cancelled, the remaining promise to send in furniture would appear without reason or consideration. *Bird v. Higginson (a)*, where the demise of a messuage without deed was held void, because coupled with a license to shoot and fish, is analogous to the present case. *Wood v. Benson (b)* is consistent with the argument for the defendant. [Lord *Denman C. J.* It is merely an exemplification of the doctrine in *Mayfield v. Wadsley (c)*.] *Carrington v. Roots (d)* shews that a contract void by the clause now in question cannot be the ground of an action, even though such action be not brought expressly to enforce the contract. [He was then stopped by the Court.]

J. Henderson in reply. The former case of *Mechelen v. Wallace (e)* turned on the question, whether an actual renting at 170*l.* had commenced; and it was there decided only that the furnishing was a condition precedent. The question here is, whether the contract insisted upon in this action, that is, the defendant's promise to furnish the house, affects an interest in land. The ground of decision in *Bird v. Higginson (a)* was, that the demise was entire. The argument for the defendant here assumes that the alleged contract would oblige her, not only to send in furniture, but to let a house. No such obligation is suggested in the plaintiff's

(a) 2 *A. & E.* 696. Affirmed on Error, *Bird v. Higginson*, 6 *A. & E.* 824.

(b) 2 *Tyr.* 93. *S. C.* 2 *Cro. & J.* 94.

(c) 3 *B. & C.* 357.

(d) 2 *M. & W.* 248.

(e) *Antè*, p. 54. note (b).

pleading,

pleading, or would be established by a judgment in his favour. [*Patteson J.* The declaration states that the plaintiff was to become tenant to the defendant, at a certain rent, the payment to commence from a day agreed upon.] The only promise alleged as made by the defendant, is to send in furniture.

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against
WALLACE.

LORD DENMAN C. J. The bare statement of the case on the pleadings shews that the contract in question does relate to an interest in lands. The judgment must be for the defendant.

LITTTLEDALE J. The declaration states, as the consideration for the defendant's promise, that the plaintiff was to become tenant to the defendant of the house and furniture together, if certain things should be performed; that is, if the furniture should be sent into the house in reasonable time. It cannot be contended that there was not an agreement for an interest in the land, and, that being so, the defendant's promise came within the statute.

PATTESON J. It is clear that the plaintiff, at any rate, contracted for an interest "in or concerning" "lands, tenements, or hereditaments" (a).

Judgment for the defendant.

(a) *Williams J.* was absent. See p. 14. *antè*.

1837.

Saturday,
May 27th.

The KING *against* BOURNE and Others.

Where an erroneous judgment is given by an inferior court, on a valid indictment, (as by passing sentence of transportation in a case punishable only with death), and the defendants bring error, this Court can neither pass the proper sentence, nor send back the record to the Court below in order that they may do so; but the judgment must be reversed and the defendants discharged.

ERROR from the *Monmouthshire* Quarter sessions.

The record set out that, at the *January* Quarter sessions, 1837, for the county of *Monmouth*, *Andrew Bourne*, *Francis Bourne*, and *Thomas Howerth*, were jointly indicted, in two counts, the first for burglary and the second for larceny, pleaded Not Guilty, and were convicted on the first count and acquitted on the second; and that it was thereupon considered by the Court there that *Andrew Bourne*, for his said offence, should be transported beyond the seas to such place as the King, by the advice &c., should direct, for seven years; and *Francis Bourne* and *Thomas Howerth* each for the term of his natural life. Error was assigned in several forms; the objection being, in substance, that, upon the count for burglary, judgment of transportation could not be given (a): and the parties prayed that the judgment might be reversed, and that they might be restored to the free law of the land, and to all things which, by reason of the judgment and proceedings aforesaid, they had lost. The Crown joined in error, and prayed that this Court might proceed to examine the record, and process, and the judgment, and the errors assigned, and that the judgment might be confirmed. But, upon the case now coming on for argument, Sir *J. Campbell*, Attorney-General, admitted that the judg-

(a) Under stat. 7 & 8 G. 4. c. 29. s. 11. See now stat. 7 W. 4. & 1 Vict. c. 86. ss. 1, 2, 3.

ment was erroneous, and that the only question was, whether this Court would, under the circumstances, pass the proper sentence, or remit the case back to the sessions.

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Peacock for the prisoners. The order of this Court should be that the prisoners be discharged. "The Court of King's Bench never gives judgment upon a conviction in another court:" *Rex v. Baker* (a). *Rex v. Kenworthy* (b) is no authority against the discharge: there the sessions had made an order for transportation, but had not followed it up by judgment, and this Court ordered them to proceed to judgment. But where a judgment has been given, as in the present case, and is removed by writ of error, this Court can do nothing but reverse or affirm. In *Rex v. Ellis* (c) the sessions had sentenced the prisoner to fourteen years' transportation, where the judgment ought not to have been for more than seven; and this Court, distinguishing the case from *Rex v. Kenworthy* (b), on the ground that no judgment was there passed in the Court below, refused to do more than reverse. In *Rex v. Lookup* (d), where the judgment of the Court of King's Bench was reversed in the House of Lords, this Court discharged the defendant on motion. [*Patteson* J. There the fatal objection was to the indictment itself. It was so in *Rex v. Nicholl* (e).] In *Rex v. Howes* (g), where the Crown omitted to join in error, the prisoners were discharged. [Sir J. Campbell, Attorney-General. The objection

(a) *Cartth.* 6.(c) 5 *B. & C.* 395.(e) 1 *B. & Ad.* 21.(b) 1 *B. & C.* 711.(d) 3 *Burr.* 1901.(g) 3 *Nev. & M.* 462.

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there was to the indictment (a).] If this case were remitted to the sessions for their sentence, it would probably go to a court composed of different persons from those who tried it. [Lord Denman C. J. In *Rex v. Kenworthy* (b) the case was sent back to the assizes for judgment, and those assizes would be held under a new commission. *Patteson J.* It is every day's practice to respite judgment to the next assizes.] A distinction has been taken in civil cases between error brought by

May 7th, 1834.

When error is brought on a judgment for felony, and the Crown does not join in error, the defendants will be discharged.

(a) In *The King against Howes and Thompson*, the defendants and one *Lines* were tried at the sessions for the city and county of the city of *Norwich*, on an indictment charging them in the first count, under stat. 7 & 8 G. 4. c. 29. s. 6., with an assault with intent to rob, and in the second count with a common assault. On the first count *Howes* and *Thompson* were convicted, and *Lines* acquitted. On the second count *Lines* was found guilty, but no verdict was recorded as to *Howes* and *Thompson*. The latter defendants were sentenced to transportation for life. *Lines* was discharged without day. A writ of error was brought, and the errors assigned were: 1. That there was a misjoinder of offences in the indictment, the first count being for a felony by statute, and the second for a misdemeanor at common law; 2. That the defendants were given in charge to the jury upon both counts instead of one only; 3. That the judgment delivered on the indictment is uncertain, it not sufficiently appearing for what offence the defendants are thereby sentenced to be severally transported, &c. The prayer was, that the judgment be reversed, and the defendants restored to the free law, &c., and all that they have lost, &c. The Crown not having joined in error, the Court, in *Easter* term, 1834, granted a peremptory rule (a previous rule having been made to the like effect) that judgment should be entered for the defendants, unless the coroner and attorney of this Court should join in error within four days after notice of that rule to be given to the prosecutor and the solicitor for the treasury. In the same term, May 7th, the Crown not having joined in error, the defendants were brought to the bar, and *Palmer*, on their behalf, moved for judgment. Lord Denman C. J. said that it was the constant practice, in cases of misdemeanor, to discharge prisoners for want of joinder in error; that it seemed, *à fortiori*, that the same should be done in felony; and that the Court did not see what other course they could take. It was, therefore, ordered by *The Court* [Lord Denman C. J., *Patteson*, *Littledale*, and *Williams* Js.] that the prisoners should be discharged.

(b) 1 B. & C. 711.

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the plaintiff and error by the defendant: in the first case, it has been held that a new judgment should be given; *Baker v. Lade* (a); in the second, that the judgment should be reversed merely; *Parker v. Harris* (b); because there the suit of the party prosecuting the writ is only to be eased and discharged of the judgment. This distinction is recognised in 3 *Bac. Abr.* 118, 119. *Error*, (M) 2. (c), and may be extended, by analogy, to Crown cases. Further, where the Court below has a discretionary power as to the sentence, this Court, which cannot exercise the discretion, will not pass the sentence. Now, in the present case, the Court below might, according to their view of the circumstances, either have pronounced judgment of death, or ordered that judgment to be recorded, under stat. 4 G. 4. c. 48. And the statute, by sect. 1, expressly vests this power in "the Court before which" the "offender shall be convicted." In the present case, the discretion of the Court below was so far influenced by the facts, that different sentences were passed upon the prisoners. The son of a person executed may bring error, as in *Rex & Reg. v. Walcott* (d); there it would be impossible to pass a new sentence, or remit the case back to the court which tried.

Sir *J. Campbell*, Attorney-General, *contra*. This Court may pass sentence *virtute officii*; or may remit the case to the justices, who are not precluded by the terms of their commission from passing sentence of death, where no difficulty arises. The conviction being lawful, there is no authority for discharging the prisoners.

(a) *Carth.* 253.(b) 1 *Salk.* 262.

(c) 7th ed.

(d) 4 *Mod.* 395. See 9 *How. St. Tr.* 560.

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The Court is bound to give that judgment which appears, upon the whole record, to be the proper one; and there is no difference, in this respect, between a court of error and the court of original jurisdiction; *Le Bret v. Papillon* (a). The general rule is that, if, on error, judgment be reversed, the court of error shall give the same judgment as the inferior court ought to have given; *Com. Dig. Pleader* (3 B 20.). [Lord Denman C.J. In 3 *Inst.* 210, c. 101, the consequences of a judgment being pronounced erroneous are pointed out, but no mention is made of any proceeding but reversal. The distinction between error at the suit of the plaintiff and of the defendant is recognized in *Com. Dig. Pleader* (3 B 20.)]. That distinction, as stated in 3 *Bac. Abr.* 118, 119. *Error* (M) 2., and the cases there cited, applies to civil cases, and can have no place in a criminal proceeding, which is for the benefit of the public. The erroneous "judgment," to which those authorities refer, bears no analogy (for the present purpose) to the sentence in a criminal case. Where parties have been properly convicted, no injury can be done to them by pronouncing the right sentence. If the Court think proper to remit the case to the sessions, it may as fitly be done here as in *Rex v. Kenworthy* (b). There the Court below had given no judgment, but merely made an order; here there is a judgment in form, but it awards a kind of punishment which no law sanctions in the case of burglary; the sentence, therefore, is rather a nullity than an erroneous judgment; it is as if the Court had imposed a penance, or a journey to *Rome*. In that respect the case differs from *Rex v.*

(a) 4 *East*, 502.(b) 1 *B. & C.* 711.

Ellis,

Ellis (a), where the Court below had power to inflict transportation, but awarded it for an undue period. [*Patteson J.* In *Rex v. Kenworthy (b)* *Abbott C. J.* said, "Perhaps no judgment at all has been given; and if so, there cannot be any reversal"]. The only reason that could be urged, practically, against remitting such a case to the sessions would be that the punishment is discretionary, and a future court of quarter sessions may not be acquainted with the facts. But the punishment, in this case, is fixed by statute, so as to admit of no exercise of discretion. The alternative of pronouncing or recording sentence of death could create no real difficulty, because, by stat. 4 G. 4. c. 48. s. 2., recording judgment of death is equivalent to pronouncing it and reprieving. The reprieve might be subsequently carried into effect, or the prisoners executed, according to the facts which might be represented to the Crown. And even if this were otherwise, a discretion may as well be exercised at a session subsequent to the trial as at a subsequent assize. As to the power of this Court to dispose of the case, *Rex v. Garside (c)* and *Rex v. Athoe (d)* shew that the Court may award execution on a record brought before it by certiorari: and it must have the same power to pronounce sentence. In *Rex v. Baker (e)* this Court refused to give judgment upon a conviction in another court; and they did the same in *Rex v. Nichols (g)*: but in the latter case they assigned, as a reason, that, the case being tried at the sessions, they could have no information of the merits. Those were cases of misdemeanor punishable by fine, in ap-

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(a) 5 B. & C. 395.

(b) 1 B. & C. 712.

(c) 2 A. & E. 266.

(d) 1 Stra. 553.

(e) Carth. 6.

(g) 13 East, 412. note (a). S. C. 2 Stra. 1227.

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portioning which a knowledge of the facts was indispensable. Here, the judgment to be given is simply that of death; it is not in the discretion of the Court to alter it: they may record, instead of pronouncing the sentence; but that, in legal effect, makes no difference. In *Rex v. Kenworthy* (a) Abbott C. J. says, that this Court may pass judgment on conviction in an inferior court, “*where the punishment is not discretionary.*”

Peacock in reply. In *Rex v. Athoe* (b) and *Rex v. Nichols* (c), no sentence whatever had been passed by the courts below. If the present case were remitted to the sessions for judgment, and they gave it, there would be two different records, as was objected in *Rex & Reg. v. Walcott* (d). Awarding execution on a valid judgment, as was done in *Rex v. Garside* (e), is very different from reversing a bad judgment and substituting a good one. To say that pronouncing sentence of death at the sessions would be equivalent to recording it, is to assume that, if sentence were so pronounced, there would be a reprieve, which this Court cannot know. The prayer, on behalf of the Crown upon the record, is merely that the judgment should be affirmed. The Attorney-General, who admits this judgment to be erroneous, is not entitled to ask that a valid one should be passed. [*Patteson* J. The distinction between error brought by plaintiff and by defendant is repudiated in *Gildart v. Gladstone* (g); and many of the authorities are referred to, particularly *Anon.* 1 *Salk.* (h).] In *Gildart v. Gladstone* (g) the

(a) 1 *B. & C.* 711.

(b) 1 *Stra.* 553.

(c) 13 *East*, 412. note (a). *S. C.* 2 *Stra.* 1227.

(d) 4 *Mod.* 395.

(e) 2 *A. & E.* 266.

(g) 12 *East*, 668.

(h) 1 *Salk.* 401.

defendant

defendant brought error, and the Court held him entitled to something more than a reversal, namely, to judgment as it ought to have been given in the Court below. It does not follow that, where a defendant brings error, the Court will give the plaintiff that which ought to have been the judgment below. Such a rule would in the majority of cases make a writ of error useless to the defendant; as, for instance, in *Rex v. Pappineau* (a) on the second objection, which turned upon the want of an adjudication that the nuisance should be abated. [*The Attorney-General* referred to *Street v. Hopkinson* (b), as shewing that the Court was not bound by the prayer of an improper judgment.]

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Lord DENMAN C. J. This is a writ of error upon a judgment of transportation passed on three persons, none of whom was subject by law to any but capital punishment. The objection is pointed out, and a discharge prayed for. It is contended that, although the judgment be wrong, the Court may take one of two courses; that it may remit the case back to the Court below for judgment, or may itself pronounce such judgment as it knows to be right on such a conviction. As to the course first suggested, I think we have no such power. We cannot say that the Court below has given no judgment: if that had been so, and the case had merely come before this Court for the purpose of obtaining its opinion, we might have heard the point discussed, and remitted the case again to the Court below for judgment. Here a judgment has been given, which the prisoners call in question: we cannot say that the Court below shall be required to give another judgment. As

(a) 2 Stra. 686.

(b) 2 Stra. 1055. See the report, *S. C., Ca. K. B. temp. Hard.* 345.

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to the second course proposed, it appears to me that *Rex v. Ellis* (a) is decisive. I find no case in point; but that very much resembles the present. There the sessions, on a conviction of petty larceny, had passed sentence of transportation for fourteen years, having power only to transport for seven. The learned counsel for the Crown in that case contended, first, that the judgment of transportation for fourteen years was correct; secondly, that it was good as a judgment of transportation for seven years; thirdly, that the prisoner might be remanded to the Court below, to receive the proper judgment. It never occurred to him to argue that this Court could supply what was wanting in the judgment which error had been brought to reverse. The Court took time for consideration, and Lord *Tenterden* afterwards delivered their opinion on the three points, on all of which the decision was against the Crown. It is impossible to suppose that the counsel who argued that case, and the Court, composed as it was then, would have overlooked the point now made, if it could have been raised with success. I think that, with such a case before us, we cannot amend the judgment in the manner now prayed on the part of the Crown; and, as we cannot send the case back to the Court below, the judgment must be reversed.

LITLEDALE J. I think we have no power to send the case back to the sessions. In *Rex v. Kenworthy* (b) no judgment had been given: an order only had been made; therefore the case was remitted back to the sessions. Here the justices in sessions have given judgment; they are *functi officio*. Then can this Court

(a) 5 B. & C. 395.

(b) 1 B. & C. 711.

correct the erroneous judgment? It is said in *Hawk. P. C. b. 2. c. 50. s. 19. (a)*, citing 3 *Inst.* 210., that, "if the judgment be erroneous, both that and the execution thereupon, and all former proceedings shall be reversed by writ of error; but if the execution be erroneous, that only shall be reversed." It would probably have been added that the court of error may proceed to pass the proper judgment, if such an authority had been considered to exist. It is not necessary to enter into the cases (*Greene v. Cole (b)*), and some others,) on which a distinction has been grounded between error by the plaintiff and error by the defendant; or to give an opinion as to the ruling in *Gildart v. Gladstone (c)*, which seems contrary to some former decisions. It appears to me that *Rex v. Ellis (d)* is an authority by which we may be guided in this case, and that the judgment must be merely reversed.

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PATTERSON J. The first point depends upon the question, whether there has been any judgment in this case. If there had been none, *Rex v. Kenworthy (e)* would have been an authority for our sending it back. It appears strange, in that case, that there should have been a discussion upon a writ of error where no judgment existed. I suppose that the Court, perceiving, after error brought, that there was no judgment below, would not give judgment of reversal, but sent the record back to the Court below, in order that they might give some judgment; as if quashing the writ of error. We might do so here, if there had been no judgment

(a) Vol. ii. p. 655. *Curwood's* ed. Vol. iv. p. 503. *Leach's* ed.

(b) 2 *Saund.* 228, 256. See notes (1) and [x] to *Jaques v. Cesar*, 2 *Wms. Saund.* 101 w.

(c) 12 *East*, 668.

(d) 5 *B. & C.* 395.

(e) 1 *B. & C.* 711.

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below; but we cannot say that there is none. The sessions have, in form, pronounced a judgment; and, that being so, if we were to hold it a nullity because it is erroneous, the same might be urged whenever an erroneous judgment came before us. We cannot reverse the judgment and send the case back to the sessions; there is no instance in which a court of error has so proceeded. It is true that, on error to the Court of Exchequer Chamber, cases are sometimes remitted to the Court below; but that is in order that the Court below may enforce the judgment of the Exchequer Chamber, which that court itself cannot do; but not that the Court below may pass a new judgment.

The question then arises, whether we can ourselves pass the right judgment in this case? On that I have entertained considerable doubt. The distinction, taken in *Parker v. Harris* (a), between a plaintiff and a defendant bringing error, seems to be contradicted by the *Anonymous Case* (b). It is not said there who brought the writ of error; it may have been brought by the plaintiff to reverse his own judgment. That does not appear; but in *Gildart v. Gladstone* (c) the case is cited with seeming approbation by *Bayley J.* The decision in this last case, however, is no authority on the point before us, because there the question was, on reversal, what judgment could be given in favour of the party bringing error. Cases in which judgment has been given by this Court on records brought up by certiorari or habeas corpus, no judgment having been given below, are not in point; there the Court is bound to pass such judgment as should have been passed in the court from which the record comes: but no in-

(a) 1 *Salk*, 262.

(b) 1 *Salk*, 401.

(c) 12 *East*, 670.

stance is given in which this Court has reversed a judgment and passed another. Neither are the cases applicable in which the judgment has simply been reversed on a defective indictment, as *Rex v. Look-up* (a), and *Rex v. Nicholl* (b). There, even according to the rule cited from *Com. Dig. Pleader* (3 B 20.), that the court of error should give the same judgment as should have been given by the Court below, the defendants were entitled to be discharged. In those cases the question arose on an imperfect indictment; here it is on an improper judgment. But then we are referred to *Rex v. Ellis* (c), and but for that case I should have been doubtful as to the present. It was urged there that the case should be sent back to the sessions, but not that this Court should give judgment. If such a point could have been taken with a probability of success, I think it would have been put by the counsel for the Crown. And, considering who delivered the judgment there, in which this point was not noticed, the case is an authority for our present decision. As to the argument that this Court cannot interfere because the punishment is discretionary, I think it is far best to proceed by a broad rule, and to say that the discretion makes no difference. The enactment in 4 G. 4. c. 48., as to recording judgment of death, is a regulation of form merely, and does not affect the question (d).

Judgment of reversal, as prayed. And ordered, further, that the said *A. B.*, *F. B.*, and *T. H.* be now severally discharged out of custody as to their commitments in execution of the said judgment.

(a) 3 Burr. 1901.

(b) 1 B. & Ad. 21.

(c) 5 B. & C. 395.

(d) *Williams J.* was absent. See p. 14. *antè*.

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Pauper, by deed recited to be made for the purpose of paying his creditors, conveyed his freehold estates and assigned his personal property to *A., B., and C.*, in trust to sell, and to receive the proceeds and rents, &c. By the same deed he covenanted, on request made by the trustees, to surrender his copyhold estates in *D.* to their use, or as they should appoint, and in the meantime to stand seised of the same in trust for them; and *A., B., and C.* were to stand possessed of and interested in the copyhold on the same trusts as the freehold. It was further declared that *A., B., and C.* were to be possessed of, and interested in, the monies to

arise or be collected as above mentioned, in trust to pay the pauper's creditors; and, if there should be any surplus, to repay it to him, his executors, &c.

While the above trusts continued, and before the copyhold was surrendered, pauper resided forty days in the parish in which the copyhold lay, but not on the estate.

Held, that he gained a settlement by such residence.

ON appeal against an order of two justices, removing *Thomas Beckey* from the parish of *Dedham*, in the county of *Essex*; to the parish of *Ardleigh* in the same county, the sessions (*January 1836*) confirmed the order, subject to the opinion of this Court upon a case which was stated, in substance, as follows.

The pauper was, before and until 1832, seised and possessed of freehold and copyhold estates in the parishes of *Ardleigh, Langham, and Dedham*, in *Essex*, which he derived as devisee in fee of his father, and to which copyhold, situate in *Dedham*, he was admitted in *December 1821*, to hold to him, his heirs and assigns for ever. The pauper received the rents of the said premises from the time of his father's death to *January 1832*. He resided at *Ardleigh* from the time of his father's death, until 17th *April 1832*, when he went to reside at *Dedham*; and he continued to reside there from that time until the hearing of the appeal. He did not occupy the said copyhold premises, but resided during the whole time in other premises in *Dedham*.

By indentures of lease and release and assignment, dated 10th and 11th of *January 1832*, the release and assignment being made between the pauper of the one part, and *Priscilla Abrey, Joseph Osborne, and Samuel*

Abrey

Abrey of the other part (and executed by the pauper on the day of the date), reciting that the pauper was seised and possessed of certain freehold and copyhold estates in the parishes of *Ardleigh*, *Langham*, and *Dedham*, in *Essex*, and was also possessed of certain stocks, effects, and debts; and that, to enable him to pay his creditors, he had resolved to convey and assure all his freehold messuages, lands, &c., and to covenant to surrender and assure all his copyhold messuages, lands, &c., unto and to the use of the said *P. A.*, *J. O.*, and *S. A.*, their heirs and assigns, and to assign his stock, effects, and debts unto them, their executors, administrators, and assigns, upon the trusts after mentioned: It was witnessed, that, to the intent to enable the said pauper to provide for the demands of his several creditors, and in pursuance of the said agreement, and for the nominal considerations therein mentioned, he, the pauper, by virtue of all powers and authorities him enabling thereto, directed, limited, and appointed, and also granted, bargained, sold, aliened, and released, to *P. A.*, *J. O.*, and *S. A.*, in their possession then being by the bargain and sale therein mentioned, all his freehold messuages, lands, tenements, and hereditaments in *Ardleigh*, *Langham*, and *Dedham*, which he was seised of or entitled to for any estate of freehold and inheritance in possession, reversion, remainder, or expectancy, and the reversion, &c.; and all the estate, &c., together with all deeds, to hold unto and to the use of the said *P. A.*, *J. O.*, and *S. A.*, their heirs and assigns: Upon trust that they, the said trustees, should sell the same for the best price, &c., and should make all requisite contracts, &c., and should collect and receive the rents, &c., of such of the said freehold pre-

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mises as for the time being should not be sold under the trusts: And it was further witnessed that, for the considerations therein aforesaid, the pauper for himself, his heirs, executors, and administrators did covenant, promise, and agree to and with *P. A.*, *J. O.*, and *S. A.*, their heirs, executors, and administrators, that he, the pauper, or his heirs, should and would, upon request made by them, the said *P. A.*, *J. O.*, and *S. A.*, or either of them, their or either of their heirs, executors, administrators, or assigns, well and effectually surrender, according to the custom of the respective manors of which they were holden, all and every the copyhold or customary messuages, lands, tenements, and hereditaments, of him the said pauper, situate in the several parishes of *Ardleigh*, *Langham*, and *Dedham* aforesaid, and holden of the several manors of &c., and the reversion or reversions, remainder and remainders, yearly and other rents, issues, and profits thereof; and all the estate, right, title, interest, &c., both at law and in equity, of him, the pauper, of, in, to, or out of the said hereditaments and premises, to the only use and behoof of the said *P. A.*, *J. O.*, and *S. A.*, their heirs and assigns, or as they, or the survivors or survivor of them, his heirs or assigns, should order, direct, and appoint, or to any purchaser or purchasers under the trusts therein declared of the same: And that, in the mean time, and until such surrender or surrenders should be made, and the said *P. A.*, *J. O.*, and *S. A.*, their heirs or assigns, or such other person or persons as aforesaid, should be admitted under or by virtue of the same surrender or surrenders, the said pauper and his heirs should stand and be seised and possessed of the said copyhold or customary hereditaments and premises; and
every

every part thereof, with the appurtenances, in trust for the said *P. A., J. O., and S. A.*, their heirs and assigns: And it was thereby declared and agreed that the said *P. A., J. O., and S. A.*, their heirs and assigns, should thenceforth stand possessed of and interested in the said copyhold or customary messuages, lands, &c., upon trust to sell and dispose of the same, in the same manner and with the same powers and authorities as were thereinbefore declared of and concerning the said freehold hereditaments and premises; with a declaration, that the person or persons who should pay to the said trustees any purchase-money, rents, &c., of the said freehold or copyhold messuages, lands, &c., should not be obliged to see to the application, &c., and that the receipts of the trustees for the same should be sufficient discharges. And it was also witnessed that, for the considerations aforesaid, the pauper assigned to *P. A., J. O., and S. A.*, their executors, &c., all the household furniture, stock, effects, and debts, and all other the personal estate of him the said pauper, to hold to the said *P. A., J. O., and S. A.*, their executors and administrators, upon trust to sell, collect, get in, and receive the same, in manner in the now reciting indenture expressed.

And it was by the said indenture declared and agreed, by and between the parties thereto, that *P. A., J. O., and S. A.*, their executors and administrators, should stand and be possessed of, and interested in, the monies to arise and be received by virtue of the sales thereinbefore authorized to be made, or to be collected and gotten in by the ways and means therein aforesaid, or otherwise to arise from or in respect of the premises thereby granted and released, covenanted to be surrendered

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rendered and assigned, or expressed or intended so to be, upon trust therewith and thereout, in the first place, to pay the costs and charges in the said indenture expressed, and upon further trust to pay, *pari passu*, and without any preference or priority, to the several creditors of the said pauper, the amount of their respective debts; and, if there should be any residue or surplus, upon trust to pay the same to the said pauper, his executors, &c.

The indenture contained a declaration that the trustees should manage the farming business, &c., of the pauper, until the aforesaid sales should be made and completed, in such manner as they should deem most for the benefit and interest of the estate of the said pauper.

By deed-poll of 18th *January* 1832, after reciting the trusts of the indenture of release of 11th *January* 1832, as before set out, it was witnessed that each and every the parties executing the same did covenant and agree with the pauper to accept the provision made by the said indenture of release, in full discharge and satisfaction of their several demands; and, on receipt thereof, to execute necessary releases and acquittances, &c.; and that they would not arrest or prosecute him, &c.; with a proviso that, if the trustees should be prevented carrying the trusts into effect, the said creditors should be at liberty to proceed for recovery of their debts.

On the second of *October* 1832, the pauper, in consideration of 50*l.*, in the surrender stated to be paid to him by one *William Downes*, who had verbally agreed to purchase the said premises on the 11th of *May* preceding, surrendered, out of court, according to the custom of the manor, the said copyhold cottage and piece of land in *Dedham*, to the use of the aforesaid

W. Downes

W. Downes (who was admitted 20th November 1832), to hold to him, his heirs and assigns.

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ADDLEBROM.

The question for the opinion of this Court was, whether, after the execution by the pauper of the indentures of 10th and 11th January 1832, and of the deed of assent by the creditors of 18th January 1832, and from thence down to the time of the admission of *W. Downes*, or down to the time of the said surrender to him, or during the period of any forty days after 17th of April 1832, the pauper continued to have an estate or interest in the copyhold premises in *Dedham* sufficient to confer a settlement upon him; and whether he gained such settlement by his residence in *Dedham* during the period and in the manner before stated.

Thesiger and *Dowling* in support of the order of sessions. The pauper gained no settlement. The trustees had an equitable interest in the copyhold in *Dedham*; and if, in execution of the trust to sell, they had assigned that interest, the lord would have been bound to admit the assignee. The pauper had put the beneficial interest out of his power, and had only the bare legal estate. In all the instances where a party has been held to gain a settlement by an estate in which he had not the beneficial interest, he has been resident on it: here the pauper was not resident on the copyhold, though he lived in the parish. By the deed, even the management of the property was to be in the trustees. A guardian in socage gains a settlement by residence on the ward's estate, *Rex v. Oakley (a)*; but he has an interest in the property, may distrain and

(a) 10 East, 491.

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The King
against
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ants of
Ardleigh.

avow, and is accountable for the profits. The condition of the pauper here was very different. A mortgagee gains a settlement if in possession, not otherwise; possession decides whether the estate gives a settlement to him or the mortgagor. It may be said that the pauper had at all events a legal interest in the surplus. [*Patteson J. Lord Mansfield, in Rex v. St. Michael's, Bath (a)*, seems to have attached but little importance to the chance of a surplus.] His judgment there is strongly against the settlement now claimed. In *Rex v. Holm East Waver Quarter (b)*, where the pauper was held to be irremovable, the trustee never interfered with the estate, and the pauper resided on it; a circumstance relied upon in the judgment of the Court. In *Rex v. Edington (c)*, where the settlement by estate was held valid, the pauper was considered as substantially a mortgagor in possession. But in *Rex v. Tarrant Lauceston (d)*, where the pauper had conveyed his interest in the premises absolutely to a trustee for certain purposes, reserving to himself only a contingent interest in case those purposes should be accomplished, which was very doubtful, and the trustee had permitted him to continue on the premises, the court refused to consider him as a mortgagor in possession, and decided against the settlement. In that case, indeed, and in *Rex v. St. Michael's Bath (a)*, there was an actual conveyance of the pauper's interest, whereas, here, the pauper, as to the copyhold, had only covenanted to surrender; but that makes no material difference. The pauper here was a bare trustee of the copyhold, not receiving the rents or managing the property, nor even

(a) 2 Doug. 630.

(b) 16 East, 127.

(c) 1 East, 288.

(d) 3 East, 226.

permitted

permitted to reside upon it. He had nothing of his own from which he could claim to be irremovable. In *Rex v. Cregrina* (a) the pauper, who had sold his share in an equity of redemption, was held incapable of acquiring a settlement in respect of the mortgaged property, though it was argued that, if proceedings had been taken for a redemption, he must have been made a party.

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—
The KING
against
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ants of
ADDLEIGH.

Ryland and *Turner*, contra. Supposing that by this deed the equitable estate was clearly and entirely divested, still it is sufficient that the pauper had the legal estate. He had only covenanted to surrender the copyhold on request, and to stand seised in trust until surrender and admittance. An ejectment, if brought, must have been on his demise: he would have been the proper party to distrain. In *Rex v. St. Michael's, Bath* (b) the legal estate had been conveyed, and the pauper obtained possession afterwards by fraud; which circumstance is particularly relied upon by Lord *Kenyon* and *Grose J.* in *Rex v. Edington* (c). In 2 *Nol. P. L.* 81 (d) it is laid down, that “the *jus proprietatis*, or mere right of property, is unnecessary to the gaining a settlement; if the party has the right of possession, which he can maintain in a possessory action, it is sufficient.” In *Rex v. Oakley* (e) *Le Blanc J.* says that, “in order to make persons irremovable on account of having property in the parish, it is not necessary to have a beneficial interest in it for themselves, but it is sufficient that they reside there for some beneficial pur-

(a) 2 *A. & E.* 536. See *Rex v. Aslackby*, 5 *A. & E.* 200.

(b) 2 *Doug.* 630.

(d) 4th ed.

(c) 1 *East*, 288.

(e) 10 *East*, 495.

pose

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The King
against
The Inhabit-
ants of
ARDLEIGH.

pose to another." *Bayley J.*, in *Rex v. Geddington (a)*, intimates an opinion that in stat. 9 G. 1. c. 7. s. 5. the legislature, when speaking of a settlement by "estate or interest" purchased, contemplated a legal interest only. As to residence, an occupation of the premises is not necessary; residence in the parish is sufficient; *Rex v. Houghton le Spring (b)*. *Rex v. Dorstone (c)* was a stronger case than this. There lands descended to the pauper's wife on *November 14th*; on *December 14th* the pauper and his wife signed an agreement with one *D.* to sell him the lands, and the purchase was completed in *February*. The pauper resided forty days, from *November 14th*, in the parish where the lands lay, but did not occupy any part of them, and it was held that he gained a settlement, notwithstanding the agreement made within the forty days, that being only executory. In *Rex v. Cregrina (d)* the pauper had no estate, either legal or equitable, in the premises.

LORD DENMAN C. J. The pauper in this case, while he continued to have the legal estate, was irremovable, and it was not necessary that he should reside on the premises. We do not know that he would or could ever have been called upon to surrender the copyhold. The trustees had power to require a surrender, but only for the purposes of the trust. If there had been sufficient funds from other sources, he might have retained the copyhold property, though called upon to surrender. Residing then in a parish where he had an estate in contemplation of law, he gained a settlement in that parish.

(a) 2 B. & C. 133.

(b) 1 East, 246.

(c) 1 East, 296.

(d) 2 A. & E. 536.

LITTLEDALE J. It was sufficient that the pauper had the legal estate. The trustees were appointed for his benefit, to discharge his debts. In 2 *Nol. P. L.* p. 92 (a) it is said that, to acquire a settlement by estate, the party "must have either a legal or equitable title to an interest in possession;" and, in the same volume, p. 105, that it is "immaterial whether the party has a beneficial interest in the estate." The pauper here would have been lessor of the plaintiff in an ejectment.

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against
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ants of
ARLINGTON.

PATTESON J. This case is exactly like *Rex v. Dorstone* (b), except that there the agreement was absolutely to sell; here it is to surrender when called upon. The non-residence on the estate does not seem to be insisted upon here, further than as shewing the situation in which the pauper stood with respect to the property. In *Rex v. Cregrina* (c) the only interest alleged as a ground of settlement was a doubtful equitable interest, and the Court was of opinion that the pauper had no interest at all (d).

Order of sessions quashed.

(a) 4th ed. (b) 1 *East*, 296. (c) 2 *A. & E.* 536.
(d) *Williams J.* was absent. See p. 14. *antè*.

1837.

*Tuesday,
May 30th.*ECKSTEIN and Another *against* REYNOLDS.

Tender, as follows. Defendant's agent told plaintiff that he had called to tender 8*l.* in settlement of defendant's account; plaintiff answered that he would take nothing less than the bill, which defendant's agent produced at the time, amounting to 19*l.*

Held, that the question whether this tender was conditional or unconditional, was proper to be left to the jury.

DEBT for goods sold and delivered, &c. Pleas, nunquam indebitatus, except as to 8*l.*, and, as to that, a tender. On the trial before Lord *Denman* C. J., at the *London* sittings after *Michaelmas* term, 1835, the defendant, in support of his plea of tender, called a witness, who stated that he had tendered to one of the plaintiffs 8*l.*, saying that he had called to tender 8*l.* in settlement of *Reynolds's* account; that the plaintiff said he would take nothing less than his bill; and that, at the time of this conversation, the witness produced the bill, which (after deducting for payments allowed by the plaintiff) amounted to 19*l.* 5*s.* 6*d.* The Lord Chief Justice left it to the jury whether this was a conditional or an unconditional tender, expressing his own opinion that it was conditional; but adding that, if the words "in settlement" merely meant "in payment," the tender was good, for that this was the meaning of every tender. The jury found that it was unconditional, and gave a verdict for the defendant on both issues. In *Hilary* term, 1836, *Thesiger* obtained a rule for a new trial.

Alexander (with whom was *C. C. Jones*), now shewed cause. It is true that a tender, under circumstances which, if the plaintiff accept it, preclude him from proceeding further, is not valid. Here the plaintiff would not be so precluded. At all events, the finding of the jury disposes of the question; for, if any expression
used

used in a commercial transaction be ambiguous, the jury are to decide upon its meaning; *Clayton v. Gregson* (a), *Bold v. Rayner* (b). If the words used had been "as a settlement," they would have been stronger, though, perhaps, not conclusively conditional. The fair construction is, that the money was offered by the defendant, in order to discharge what he considered to be the debt. But that left the plaintiffs at perfect liberty to proceed for the residue, if they considered that more was due. In *Evans v. Judkins* (c) the tender was held bad, because made only upon condition that the plaintiff would accept it as the balance due. Whether that point was put to the jury or not, does not appear. In *Read v. Goldring* (d) the party tendering said that he was come "to settle" the business between the defendant and the plaintiff; and, a verdict being given for the defendant, the Court refused a rule for a nonsuit. (He was then stopped by the Court.)

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—
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REYNOLDS.

Turner (with whom was *Thesiger*), contra. The plaintiff would have been precluded from proceeding if he had accepted the tender under these circumstances; and, therefore, the tender is invalid; *Evans v. Judkins* (c), *Mitchell v. King* (e), *Strong v. Harvey* (g), *Cheminant v. Thornton* (h) *Peacock v. Dickerson* (i). The words "in settlement" imply that it was to be understood that the dispute was put an end to if the money were accepted.

(a) 5 A. & E. 302. S. C. 6 N. & M. 694.

(b) 1 Mee. & Wels. 343. S. C. Tyrwh. & Gr. 820.

(c) 4 Campb. 156.

(d) 2 M. & S. 86.

(e) 6 C. & P. 237.

(g) 3 Bing. 304.

(h) 2 C. & P. 50.

(i) 2 C. & P. 51. (note).

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—
ECKSTEIN
against
REYNOLDS.

The jury should have been so instructed. At any rate, the verdict is against the evidence (a).

LORD DENMAN C. J. *Read v. Goldring* (b) is like a case which I was going to suggest. Suppose a man should begin by saying, I am come to settle, and should then go on to make an offer of the money, that could not vitiate the tender; yet, what difference can it make at which part of the conversation the expression occurs? The cases cited by Mr. *Turner* admitted of no ambiguity: here, there was enough of ambiguity to make the matter fit for a jury, and they have decided it.

LITLEDALE J. The question, whether a tender be conditional or unconditional, is not necessarily for the Judge. Some cases are clear, others not: the Judge is not bound to take the decision on himself as a matter of law.

PATTERSON J. concurred.

Rule discharged (c).

(a) The action was brought in the Palace Court, whence the defendant removed it by habeas corpus; it was, therefore, contended that the smallness of the damages would be no objection to a new trial on the ground last taken.

(b) 2 M. & S. 86.

(c) *Williams J.* was absent. See p. 14. *antè*.

1837.

LANE and PRIDEAUX *against* GLENNY.Tuesday,
May 30th.

ASSUMPSIT for work and labour as an attorney. Plea, Non assumpsit. On the trial before Lord Denman C. J. at the *London* sittings after *Michaelmas* term 1835, it appeared that the claim was for conducting certain actions in the superior courts: and the plaintiffs proved the delivery of their bill of costs; but it appeared that the bill did not contain the name of any of the courts in which the business was done. The case being proved in other respects, the jury, under the direction of the Lord Chief Justice, found a verdict for the plaintiff. In *Hilary* term 1836, *Mansel* obtained a rule nisi for setting aside the verdict and entering a nonsuit, on the ground that the names of the courts ought to have been inserted in the bill.

In an action on an attorney's bill, the defendant cannot, under the general issue, insist that a proper bill of costs was not delivered.

Crowder now shewed cause. This question cannot be raised under the general issue. In *Beck v. Mordant* (a) it was held that a plea of no bill delivered was not a plea to the merits; and the plea was struck out, the defendant having been let in to plead on affidavit of merits. In that case, it seems to have been assumed that such a defence must be pleaded: and the point was expressly ruled at Nisi Prius by *Parke B.*, in *Moore v. Dent* (b). [*Patterson J.* referred to *Morgan v. Ruddock* (c).] That was an action on an apothecary's bill; and *Patterson J.* held, after

(a) 2 *New Ca.* 140. *S. C.* 4 *Dowl. P. C.* 112. See *Holmes v. Grant*, 1 *Gale*, 59.

(b) 1 *Moo. & Rob.* 462.

(c) 4 *Dowl. P. C.* 311.

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consulting the other judges, that the omission to prove practice before 5th of *August* 1815, or a certificate, was a ground of nonsuit under the general issue. But that case was decided on the particular words of stat. 55 G. 3. c. 194. s. 21., which require the proof to be given "on the trial" by the plaintiff. The cases of an attorney and an apothecary were distinguished on this very point in a case in *Trinity* term 1836 (a).

Ball and *Mansel* contra. In *Beck v. Mordant* (b), according to the report in 4 *Dowl. P. C.*, *Park J.* thought the ruling in *Moore v. Dent* (c) questionable; and *Vaughan J.* reserved his opinion on the point. The words of stat. 2 G. 2. c. 23. s. 23. are, that no attorney or solicitor "shall commence or maintain any action or suit for the recovery of any fees," &c., till the expiration of one month after the delivery of a bill. In stat. 3 *Ja.* 1. c. 7. s. 1. it is enacted that all attornies and solicitors shall give a bill "before such time as they or any of them shall charge their clients with" fees or charges. Under these statutes, the delivery of a bill is as much a condition precedent to the action as the practice or certificate under the Apothecaries' Act, stat. 55 G. 3. c. 194. s. 21. [*Littledale J.* The object of that act was to render an unqualified person incapable of contracting at all.] Till the condition is performed there is, legally speaking, no debt. It is now held (d) that a defendant may shew under the general issue that the contract was

(a) See *Shearwood v. Hay*, and *Wills v. Langridge*, 5 A. & E. 383.; *Wagstaffe v. Sharpe*, 3 *Mec. & W.* 521.

(b) 2 *New Ca.* 140. S. C. 4 *Dowl. P. C.* 112.

(c) 1 *Moo. & Rob.* 462.

(d) See *Hayelden v. Staff*, 5 A. & E. 153., overruling *Edmunds v. Harris*, 2 A. & E. 414.

made

made on a credit not yet expired. The general issue, by *R. Hil. 4 W. 4. I. Assumpsit*, 1. (a), operates as a denial "of the matters of fact from which the contract or promise alleged may be implied by law." The law will raise no implication where the condition precedent is not performed.

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LORD DENMAN C. J. It has been decided, and the decision has not been over-ruled, that a defence arising upon the non-delivery of a proper attorney's bill must be specially pleaded. We need not, therefore, discuss the question whether this was a proper bill.

LITLEDALE J. Under the Apothecaries' Act, stat. 55 G. 3. c. 194. s. 21., the plaintiff must prove his qualification "on the trial;" and it does not signify what the plea there is, because such proof is necessary to support the plaintiff's case.

PATTESON J. *Morgan v. Ruddock* (b)¹ was decided on these words in the act: they expressly make such proof by the plaintiff on the trial necessary.

Rule discharged (c).

(a) 5 B. & Ad. vii.

(b) 4 Dowl. P. C. 311.

(c) Williams J. was absent.

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Tuesday,
May 30th.

HASLOCK *against* FERGUSSON.

B., a trader, being in bad circumstances, and indebted to defendant, asked plaintiff for a supply of goods on credit, and referred him to defendant as to her character. Defendant had dealt with *B.* some time, to the amount of several hundreds of pounds, but *B.* had latterly fallen into arrear in payments, and defendant had consequently ceased supplying her with goods, but had gone on again upon her undertaking to discharge her arrears at a certain sum per week. Plaintiff enquired of defendant's shopman as to *B.*'s credit, and defendant, on reference made to him by the shopman, said that he might give her a fair character. The shopman thereupon made a verbal representation to plaintiff, in consequence of which he trusted *B.* with goods. *B.* never paid for them, but sold them, and paid the proceeds to defendant, in discharge of her debts to him. Plaintiff brought an action for money had and received against defendant for the amount so paid.

Quære, whether, in such an action, stat. 9 G. 4. c. 14. s. 6. would have precluded plaintiff from giving evidence of the unwritten representation, if it had formed part of a fraudulent transaction, the other circumstances of which were proved by evidence independent of such representation. But, (assuming that the effect of the evidence here would have been to shew a deceitful representation, knowingly sanctioned by the defendant), Held, that evidence of such representation could not be admitted, the only proof of fraud in the defendant being the representation itself.

(a) It was in evidence that Mrs. *Barnes* was arrested in *September*; but it does not appear to have been stated who arrested her, or whether the arrest was within the defendant's knowledge.

she

ASSUMPSIT for money had and received. Plea, Non assumpsit. On the trial before Lord Denman C. J., at the sittings in *London* after last *Michaelmas* term, the material facts appeared to be as follows. The defendant was a woollendrapery, having a shop in *King Street, Covent Garden*, where the business was carried on by *Hobson*, his warehouseman. Mrs. *Barnes*, a haberdasher, was accustomed to deal at the shop, and, before *August* 1834, had paid several hundred pounds there in the course of business. In that month she owed the defendant 400*l.* or 500*l.* for goods. *Hobson* then referred her to the defendant as to the credit to be given to her for the future; and she proposed to the defendant to discharge her debt at the rate of 20*l.* a week, which he assented to, provided *Hobson* agreed to it. *Hobson* continued to give her goods on credit till *October* 1834 (a), when the credit was stopped, she being then 200*l.* or 300*l.* in arrear. In the same month

she again applied to the defendant, and made a fresh engagement to pay 20*l.* a month; and she was allowed to take goods on credit till *December*. She afterwards became bankrupt.

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In *November* 1834, Mrs. *Barnes* began dealing with the plaintiff, a silk warehouseman, to whom she was introduced by one *Harman*. She referred the plaintiff, as to her credit, to three persons, one of whom was the defendant; and the plaintiff, having made the enquiry after mentioned, supplied her with goods on credit to the amount of 443*l.*, of which sum 372*l.* was never paid. Mrs. *Barnes* sold the goods to various persons, and paid a part of the produce to *Hobson*, in liquidation of her debts to the defendant. The present action was brought to recover back the sums so paid, the plaintiff's case being that Mrs. *Barnes* had obtained the goods, upon which those sums were raised, through a false representation of her credit, made by *Hobson* to the plaintiff under the defendant's sanction.

Upon this point it was stated by Mrs. *Barnes* that *Hobson* had permitted her to give the plaintiff a reference to the defendant: it appeared also that such reference was given; that the plaintiff's traveller, named *While* (who was called as a witness), went to the house in *King Street*, and saw *Hobson*; and that *Hobson* informed the defendant that a person had called to enquire respecting Mrs. *Barnes*, and the defendant told *Hobson* that he might give her a fair character. It was then proposed, on behalf of the plaintiff, to ask *While* what *Hobson* had stated to him respecting Mrs. *Barnes*'s character and credit. The defendant's counsel objected that a statement on this subject, not

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in writing, was inadmissible by stat. 9 G. 4. c. 14. s. 6 (a). It was answered that the evidence was admissible, this action being brought, not for a fraudulent representation, but for money of the plaintiff had and received by the defendant through a fraud, of which the representation to be proved formed part. The Lord Chief Justice was of opinion that, as there was no mode of fixing the defendant in this action, except through the medium of evidence as to representation of character, the statute applied. The plaintiff was therefore nonsuited.

Sir *J. Campbell*, Attorney-General, in *Hilary* term 1836, moved for a new trial on account of the improper rejection of evidence, contending that the statute did not apply, the gist of this action being, not the misrepresentation of character, but the wrongful acquisition of property by the defendant through a fraud upon the plaintiff. He urged that the plaintiff might have brought trover for the goods supplied to Mrs. *Barnes*, if he had not chosen to waive the tort; that in an action of trover it would have been necessary to shew that the contract of sale between the plaintiff and Mrs. *Barnes* was void, having been brought about by a deceitful representation; and that in such a case the statute could not have excluded evidence of an unwritten representation. And he referred, as to the construction

(a) Stat. 9 G. 4. c. 14. s. 6. enacts, "That no action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person, to the intent or purpose that such other person may obtain credit, money, or goods upon, unless such representation or assurance be made in writing, signed by the party to be charged therewith."

of

of the statute, to *Lyde v. Barnard* (a), in which the opinions of the Barons of Exchequer were delivered during that term. A rule nisi having been granted,

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Sir *F. Pollock*, *Kelly*, and *Arnold* now shewed cause (b). The words of stat. 9 G. 4. c. 14. s. 6. are, that no action shall be brought, "whereby to charge any person upon or by reason of any representation" &c., unless made in writing. The present action, if it has any foundation, charges the defendant "by reason" of a representation as to Mrs. *Barnes's* credit. The representation is not collateral, but is the ground of the plaintiff's claim. The action must succeed if the evidence is admitted, and fail if it is rejected. It may be conceded that a representation of this kind, merely forming part of a chain of circumstances, may not be within the meaning of the statute. But, here, there is no other circumstance to charge the defendant. The representation is the only material fact to which he is not a stranger; and that could affect him so far only as it precisely followed the authority he had given to *Hobson*. *Abbotts v. Barry* (c) may be relied upon for the plaintiff; but there the jury found that the defendant was party to the fraud by which goods were obtained from the plaintiffs; and *Dallas C.J.* held that the sale, effected by that fraud, worked no change of property, and that the profits of the sale, in the defendant's hands, were money had and received to the use of the plaintiffs. In the present case there was no evidence of knowledge on the defendant's part that the goods to be obtained by Mrs. *Barnes* would be

(a) 1 M. & W. 101. S. C. Tyr. & Gr. 250.

(b) Before Lord Denman C. J., *Littledale, Patteson, and Williams Js.*

(c) 5 B. Moore, 98. S. C. 2 Brod. & B. 369.

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sold to satisfy his debt. And, further, stat. 9 G. 4. c. 14. had not passed when *Abbotts v. Barry* (a) was decided. That act was framed to prevent an evasion of the Statute of Frauds, 29 Car. 2. c. 3., s. 4., which had prevailed since the decision in *Pasley v. Freeman* (b). Parties who were prevented by the statute from suing as upon a "special promise to answer for the debt, default or miscarriages" of another, because there was no guarantee in writing, brought actions founded on the misrepresentation, which were very commonly successful. The object of stat. 9 G. 4. c. 14. s. 6., which was intended to meet this evasion, would be defeated if the plaintiff in this action could recover on the evidence offered. *Lyde v. Barnard* (c) decides nothing as to this case, though the clause in question is explained by the judgments there delivered: and Lord Abinger C. B. says, "The author of this statute appears to have had the Statute of Frauds before him. Some of his words are adopted from that statute, and where he has repudiated the words before him and adopted others, he seems to have done so with a view not to narrow, but to extend his remedy to all possible cases in which litigation, fraud, or perjury, might be prevented, by requiring a written document to attest a representation or assurance concerning or relating to the conduct, character, credit, or ability of another, by means of which representation and assurance the party making it intended that other person to obtain money, goods, or credit."

Sir J. Campbell, Attorney-General, and *Wightman*, contrà. The question is, not whether the plaintiff

(a) 5 B. Moore, 98. S. C. 2 Brod. & B. 369. (b) 3 T. R. 51.
(c) 1 M. & W. 101. S. C. Tyr. & Gr. 250.

would

would have been entitled to a verdict if his whole case had gone to the jury, but whether the cause ought to have been stopped as it was. This is an action for the proceeds of goods which were sold by Mrs. Barnes, being, legally, the plaintiff's property, because there had been no valid sale to her. The plaintiff might have brought trover, but waives the tort, and sues for money had and received. His case is, that there was a conspiracy between *Hobson* and the defendant and Mrs. *Barnes*, to acquire the goods for the defendant's benefit. If that was made out, the action was maintainable, and the objection founded on the statute cannot prevail. The facts clearly tend to the conclusion that fraud was practised to which the defendant was party. (Sir *J. Campbell* then recapitulated the facts bearing on this point.) This case is the same, in principle, with *Abbotts v. Barry (a)*. There the representation made by the defendant was the material link connecting him with the fraud by which the sale was invalidated. Can it be said that, since stat. 9 G. 4. c. 14. (which was passed so long after the decision in *Abbotts v. Barry (a)* that it cannot be supposed to have had reference to that case), an action depending on similar circumstances can no longer be maintained? The object of that act was to prevent evasion of the Statute of Frauds by suing in case as for a deceit instead of bringing *assumpsit*. The actions so framed after the decision in *Pasley v. Freeman (b)* were designed to fix a liability on the defendant, as pledged for the credit of a third person by his representation, without declaring on the representation as a contract. Where the defendant was liable, not col-

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 against
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(a) 5 B. Moore, 98. S. C. 2 Brod. & B. 369. (b) 3 T. R. 51.

laterally,

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laterally, but principally, the Statute of Frauds did not apply, and the evasion was unnecessary. The present, being an action of this latter kind, is not within the mischief of stat. 9 G 4. c. 14. s. 6. The test on this point is, not whether the action will succeed or fail as the verbal representation is admitted in evidence or rejected, but whether the representation is the gist of the action and fixes the defendant with responsibility for the credit of a third person. That is not so, where trover is brought for the goods, or money had and received for their price. If Mrs. *Barnes* had delivered the goods themselves to the defendant, and trover had been brought, the plaintiff must have called *Hobson* to prove that he, by the defendant's authority, had made the false representation through which she obtained the plaintiff's goods. The objection now made, if valid, would apply to such a case. But the effect of the evidence there would clearly be (as here) to prove that the property was never transferred, but was still in the plaintiff; the representation made by the defendant, or his authorised agent, would be part of the chain of facts making up that proof, but would manifestly not be the gist of the action. Neither the supposed nor the present action is within the words of stat. 9 G. 4. c. 14. s. 6., as brought to charge the defendant upon a representation made concerning the credit of another, "to the intent or purpose that such other person may obtain credit, money, or goods" (a). In *Hill v. Perrott* (b) the defendant, by a fraudulent guarantee, induced the plaintiff to sell goods to an insolvent, who made them over to the de-

(a) As to the word "upon" in this clause, see the judgments delivered in *Lyde v. Barnard*, 1 *Mec. & W.* 101. *S. C. Tyr. & Gr.* 250.

(b) 3 *Taunt.* 374.

fendant.

endant. The plaintiff sued for goods sold to the defendant, and the Court of Common Pleas held that the law would imply a contract by him to pay from the circumstance of the goods having been the plaintiff's and having come to the defendant's possession, *if they were unaccounted for*, and that the defendant could not be permitted to account for the possession by setting up a sale to the insolvent which he himself had procured by fraud. So, here, it may be considered that the fraud, of which the representation as to credit forms part, is not the original ground of action, but an answer to the excuse made by the defendant for having in his possession the proceeds of the plaintiff's property. These proceeds could be traced only by means of Mrs. Barnes's evidence: in the course of it, she states a *primâ facie* sale by the plaintiff to her: it then becomes necessary to shew the circumstances of that sale, and, among them, the deceitful representation which makes it invalid as against the plaintiff. If the plaintiff had brought an action grounded on the false representation, he would have sued for the value of all the goods obtained upon it.

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Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of this term (*June* 8th), delivered the judgment of the Court. The question in this case was, whether the representation which it was proposed to give in evidence came within stat. 9 G. 4. c. 14. s. 6., so as to be inadmissible unless in writing. It is suggested, on the part of the plaintiff, that the representation was fraudulent, and that the defendant caused it to be made for the purpose of fraud. The case does not appear to

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to us to raise any doubt in point of law. The question is, whether the action is brought, according to the terms of the statute, "to charge any person upon or by reason of any representation or assurance made or given concerning or relating to the character, conduct, credit, ability, trade, or dealings of any other person?" These words are followed by a clause unhappily expressed, and which I need not go into. Such then being the question, the plaintiff says that the action is not upon the representation, but for money had and received; that the representation is a mere medium of proof, the case being that a fraud was committed, in the course of which this representation was made, and that the produce of the goods obtained by such fraud belongs to the plaintiff. But the only fact on which the case of fraud rested at the time of offering the evidence was, that the defendant had authorised *Hobson* to give Mrs. *Barnes* a fair character. We think that a representation made under those circumstances is within the very terms of the sixth section of stat. 9 G. 4. c. 14., and therefore could not be received in evidence, unless put into writing. The rule must, consequently, be discharged.

Rule discharged.

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The KING *against* STARKEY.Thursday,
June 1st.

INDICTMENT for erecting and continuing a stall in a certain street called *Church Street*, in the parish of *Keighley*, in *Yorkshire*, being the King's common highway for horses, coaches, &c., whereby the highway was obstructed. Second count, like the first, laying the obstruction in a certain other street called *Church Green*.
Plea, Not guilty.

On the trial before Lord *Denman* C. J., at the *York* Spring assizes, 1836, it appeared that a market had been held in the locus in quo, which was within the manor of *Keighley*, till the time of the attempted removal of the market, hereafter mentioned, by the Earl of *Burlington*, who was lord of the manor of *Keighley*, and who claimed under a charter of *Edward I.* to *Henry de Kyghelay*, by which the King confirmed and granted to the said *H. de K.* that he and his heirs for ever might hold a market every week, on the *Wednesday*, at his manor of *Kyghelay*, and an annual fair, &c.; and that the aforesaid *Henry* and his heirs for ever might hold the aforesaid market and fair at his aforesaid manor, with all liberties and free customs to such like market and fair appertaining. The market had been held, and stalls, &c., erected, on the market day, as far back as could be recollected, without any tolls, stallage, or piccage being taken. In 1832, a committee of the inhabitants was formed, under the sanction of the Earl

B., being entitled to a market in the manor of *K.*, which was held in the public street on *B.*'s soil, removed it to another site in *K.*, which site he had demised, without demising the franchise, for a term of years. Per *Littledale J.*, the removal was bad, because the lord of the market ought to be owner of the soil in which the market is held.

By all the Court: The removal was at any rate bad, unless the public had the same privilege in the new market as in the old: and therefore, it appearing that no toll had ever been taken in the old market, but that the lease, after a covenant by the lessees to allow the soil to be used solely for the market, empowered them

to impose rents at their discretion for the liberty of selling in the market, the Court held that the removal was bad, and that the site of the old market, on the King's highway, might be used on market days as it was before the removal.

of

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of *Burlington*, for erecting a new market-place in another part of the town, within the manor, being land belonging to the Earl. Buildings for the convenience of the market were commenced; and, in 1833, the Earl granted a lease of the intended site to certain of the committee.

This lease (a) was an indenture, dated 13th *August* 1833, between *George Augustus Henry*, Earl of *Burlington*, of the first part, and *John Greenwood* and four others, of the second part; and it witnessed that the Earl of *Burlington* (in consideration of the rents, covenants, &c., thereafter reserved and contained on the part and behalf of *Greenwood*, &c., and of the works, &c., thereafter stipulated and covenanted to be erected, &c., by them on the demised premises), in exercise of all powers and authorities vested in him, or anywise enabling him in that behalf, did direct, limit, and appoint, grant, demise, lease, and to farm let, unto *John Greenwood*, &c., their executors, administrators, and assigns, all that piece or parcel of land situate in &c., as the same was then marked and set out for the purpose of erecting a new market place thereon for the town of *Keighley*, measuring &c., and containing &c., and also the right of a road of the width of &c., from and out of the street called &c., to lead into the said intended new market place, at the centre part &c., “together also with the privileges which the said *G. A. H.*, Earl of *B.*, may have in obliging persons exposing goods

(a) This lease was not produced on the trial, the prosecutor insisting merely on the removal of the market *de facto*. But, on the argument *in banc*, it was agreed, at the suggestion of the Court, that, for the purpose of determining the question finally, the lease should be considered as put in.

for

for sale openly in any of the different streets in *Keighley* aforesaid to remove the same into the said intended new market place so to be erected as aforesaid; to have and to hold the said piece or parcel of ground, right of road, and premises hereby demised or intended to be, with the appurtenances," to *John Greenwood, &c.*, their executors, administrators, and assigns, from 24th of *May* 1833, for sixty years, at the yearly rent of 10*l.* And the said *John Greenwood, &c.*, for themselves, their heirs, executors, administrators, and assigns, thereby covenanted with the Earl of *Burlington*, and the person or persons to be entitled to the reversion, to pay the rent, and (immediately, or as soon as circumstances would allow) to erect and finish a market place intended to be erected and then begun, "and all requisite conveniences for using the said premises as and for a general market for the town of *Keighley*," and lay out therein 1000*l.* at least, and also that *J. Greenwood, &c.*, their executors, administrators, and assigns, "shall and will, at all times hereafter (when the said market has been completed), appropriate and use the said premises as and for a general market for the said town and manor of *Keighley*, and the buying, selling, and dealing in marketable commodities in open market, as now used in the open markets held in the said town; and that they, their executors, administrators, and assigns, shall not nor will, at any time hereafter, use or employ the said premises for any other use, purpose, or trade whatsoever, without the previous licence and consent in writing of the said Earl of *Burlington*, his heirs, appointees, or assigns, or such person or persons so for the time being to be entitled as aforesaid; and also, particularly, that the said premises shall be open for

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public resort and the purpose of such markets, on such days of the week as the said markets and the fairs of the said town or manor of *Keighley* are now held, and any other days or times, weekly or otherwise, as the said *John Greenwood*," &c., "their executors, administrators, and assigns, shall choose so to use the same: during which periods of open market, all persons shall be at liberty to attend the same, and enter in and upon the said premises for the purpose of buying and bartering in the said markets, without the let, molestation, or hindrance, or necessity of licence first had and obtained of or by the said *J. G.*," &c., "their executors, administrators, and assigns; but, nevertheless, with full power, liberty, and authority, for them the said "*J. G.*," &c., "their executors, administrators, and assigns, to make all such orders and regulations for the maintenance and good management of the said markets, *and the renting of the stalls or other conveniences thereof, and imposing rents or other sums as and for licence and permission of vending, selling, or exposing goods to sale on the said premises, to deny entrance to the said premises for any such purpose to all persons not so authorised, and the exclusive enjoyment of all rents and profits to arise thereby, and of and from the said premises, as to them the said "**J. G.*, &c., "their executors, administrators, and assigns, shall seem meet and proper." And *John Greenwood*, &c., for themselves, their heirs, executors, and administrators, covenanted with the Earl, his heirs, appointees, and assigns, or the parties entitled to the reversion, to repair, &c., the new market place and buildings: and liberty was reserved to the Earl, his heirs, &c., to enter and view: and power of re-entry, to determine the term on non-performance of the covenants, to the Earl, his heirs,

heirs, &c.; with other covenants and provisoes not material here.

On the 9th of *June* 1834, a notice of that date, signed by an agent of the Earl of *Burlington*, and also by the steward and two bailiffs of the *Keighley* manor court, was read publicly in the old market place, and on the site of the intended new market, reciting that the Earl had found it expedient for the public convenience that the market should be removed, and held in a more convenient place within the manor, and announcing that, on *Wednesday*, 25th *June* then instant, and upon every other market day following, until other notice should be given, the market would be held in the new market, and that, after the notice, all persons who should enter in or upon the public streets for the purpose of using them as a market overt, or should set down any cart or carts, or any other thing containing goods for sale, or set up any stall or table, or erect any stand for the purpose of exposing goods to sale, in any other place within the manor, and not in the new market place, would thereby become trespassers, and liable for any obstruction thereby created, and to such actions at law as the lord of the manor and owner of the market would be thereupon entitled to bring. Copies were also posted in the streets of *Keighley*.

Another notice, dated 29th *January* 1835, signed by the clerk of the new market, appointed by the lessees, was, by the direction of the lessees, posted in the streets of *Keighley* and the neighbourhood, announcing that the new market was toll free, and that persons frequenting it were subject only to the regulations and order of the clerk of the market, who would direct in what manner,

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and in which place, goods should be therein exposed for sale.

It appeared that, between the publication of these two notices, and ever since, a market had in fact been held, on the old market days, in the new market place, and that, for several weeks, tolls, whether market tolls or for stallage did not distinctly appear, had been taken, but that no tolls of any kind had been demanded after the second notice. On *Wednesday, 25th March 1835*, the defendant put up a stall in the old market place, which was a public highway, and where it had been customary to set up stalls in the market in the same way on market days. This was the obstruction complained of in the indictment. The defendant's counsel contended that the evidence did not establish a rightful removal of the market. The Lord Chief Justice reserved the point, and directed the jury to find for the Crown, if they were of opinion that the Earl of *Burlington* was lord of the market and manor, and that an obstruction of the public highway in fact existed. Verdict for the Crown. In *Easter term, 1836*, *Alexander* obtained a rule nisi for entering a verdict for the defendant, on the point reserved.

Cresswell, Wightman, and Baines now shewed cause (a). The demand of tolls in the new market was not persisted in; and, if illegal, might be resisted: the question, therefore, is simply whether the lord of the manor, having a right to a market within the manor, might remove the market to a new site within the manor. *Dixon*

(a) The case was argued on *June 1st* and *2d*, and decided on the latter day.

v. *Robinson*

v. *Robinson* (a), *Curwen v. Salkeld* (b), and *Rex v. Cotterill* (c), shew decisively that he may; and that a party persisting in the use of the old market, after the removal, is liable to an action of trespass or to indictment. It is true that the site of the new market is leased for a term: but, if the market had not been removed, and the site of the old market had been leased, the market would have still continued. [*Littledale J.* Parties frequenting the new market would come there at the risk of being treated as trespassers.] That objection would go the length of shewing that the site of the old market could not be leased without destroying the market. But, in fact, the land is leased for the purposes of the new market only; and it appears that it is so used. The lessees could not call this a trespass. The land might have been let, excepting the market days: here the exception is of the right to exclude from the market. It will be said that the lease gives to the lessees the power of exacting rent for stalls, and that, therefore, the new market is less free than the old one: but the lord was entitled to exact stallage at any time, even in the old market, in right of the soil; and such a right is not lost by non-user. Thus, if the land be borough-english, the stallage and picage will descend to the youngest son, but the market to the heir at common law; 3 *Bac. Abr.* 556, *Fairs and Markets*, (D), note (a), (ed. 7. 1832); *The Mayor of Northampton v. Ward* (d). A plea that no payment had been made for stalls from time immemorial would be bad. [Lord *Denman C. J.*

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(a) 3 *Mod.* 107. And see *De Rutzen v. Lloyd*, 5 *A. & E.* 456.

(b) 3 *East*, 538.

(c) 1 *B. & Ald.* 67.

(d) 2 *Str.* 1238. *S. C.* 1 *Wils.* 107.

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against
Stearns.**

In 15 *Viner's Abridgment*, 245., *Market*, (B), pl. 3., it is said, "the stallage must be certain;" for which reference is made to the argument of the Solicitor-General, *Finch*, in *Rex v. Mayor of London* (a), who cites the Year-book, *Mich. 9 H. 6. f. 45. pl. 28. (b)*. That is true of tolls only, properly so called. [*Littledale J.* If the soil can be granted away, and yet the market remain in the grantor, the party using the market might be subject to two actions.] That would be for two different claims: the division is recognised in the case of the land being borough-english. If the lord had removed to a place which he had not demised, he might have claimed stallage in the new market as well as the old: then what difference can it make, that he has assigned over that property in virtue of which he could have claimed the stallage? Besides, it does not appear that here the lord has reserved the market to himself; the lease passes all his rights; there is, therefore, a mere substitution, during the term, of one lord for another. The lord might have hired land of another for the purpose of holding his market. Again, if the market be less free than before, the person using it may resist the new exaction; and that is the proper way of trying the question. Or he may resist the lord's authority, as owner of the market, on the ground that the lord no longer gives the proper protection and immunities. So he might sell without the limits of the market, if room were not left within them; *Prince v. Lewis* (c). But he cannot insist upon the permanence of the market on the old site. Or, if the lord have been guilty of extortion, or have removed to an inconvenient place, the franchise

(a) 2 *Show.* 266.(b) *Prior of B. in London v. Barton.*(c) 5 *B. & C.* 363.

may

may be forfeited by him, and revoked by scire facias;
 3 *Bac. Abr.* 555, *Fairs and Markets*, (C); per Lord
Ellenborough (a) and *Abbott J.* (b) in *Rex v. Cotterill*.

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Alexander and *Bliss* (with whom was *R. C. Hildyard*),
 contra. If the prosecutor has failed in establishing a
 legal removal of the market, the defendant is entitled
 to an acquittal; *Rex v. Smith* (c), *Holcroft v. Heel* (d).
 Now, the removal is not properly made unless the lord
 was entitled, not only to the place where the market
 was originally held, but to the place where he proposes
 to hold it in future. It is conceded that the lord of a
 market may remove to another place in the manor, &c.,
 within which the market is granted, provided it be to a
 place which is his own soil, or over which he himself has
 as full rights as he had in the relinquished site. This is
 all that *Dixon v. Robinson* (e), *Curwen v. Salkeld* (g),
 and *Rex v. Cotterill* (h) establish. Here the site of the
 old market is out of the lord's possession for a term,
 during which he cannot perform his duty to the parties
 frequenting the market, or secure their immunities.
 The latter fact is clear, inasmuch as for several weeks
 toll was exacted by the lessees of the new site; and
 their subsequent waiver could be no protection to
 parties resisting any future exaction of the same nature.
 It may be inferred from the language of Lord *Ellen-*
borough in *Curwen v. Salkeld* (g), and from that of
Abbott C. J. in *Prince v. Lewis* (i), that the lord cannot

(a) 1 *B. & Ald.* 75.(c) 4 *Esp.* 111.(e) 3 *Mod.* 107.(h) 1 *B. & Ald.* 67.(b) 1 *B. & Ald.* 79.(d) 1 *B. & P.* 400.(g) 3 *East*, 538.(i) 5 *B. & C.* 363.

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remove to a place not equally convenient, in all respects, with the original site. So in *Mosley v. Walker* (a) Bayley J. said, "I take it to be implied in the terms in which a market is granted, that the grantee, if he confine it to particular parts within a town, shall fix it in such parts as will from time to time yield to the public reasonable accommodation; and that if the place once allotted ceases to give reasonable accommodation, he is bound, if he has land of his own, to appropriate land on which to hold it; or if not, to get land from other people in order that the market which was originally granted for the benefit of the public, as well as for the benefit of the grantee, may be effectually held; and that the public may have the benefit which it was originally intended they should derive from it." Now, here, the lease shews, at the utmost, only a right of action in the lessor if the new market be impeded: but how can this be a good substitute for the right which the public had, in the old market, to enforce their own privileges directly? In fact, the lease grants to the lessees authority to impose rents, not only on stalls (which rent probably could not have been imposed in the old market against the usage, and after the dedication for a long time) but "for licence and permission of vending, selling, or exposing goods to sale on the said premises," and to deny entrance for such purpose to persons not so authorised. That allows the lessees to exact tolls, properly so called, and to exclude parties refusing to pay them. But there are no tolls in the old market: nor could any be legally claimed there; for they are not incident to a market unless expressly given, *Com. Dig. Market*, (F 1.), and the charter of

(a) 7 B. & C. 40, 55.

Edward I. does not give them, nor is any usage shewn. Besides, the market not being leased, the correction of it will be in the original lord, the lessor, while the market tolls and its soil will, under the lease, be vested in others. It is said that the public may, if the new market place be inconvenient, use ground without the limits: but it does not appear that there is any such ground which can be used. It is also said that a *scire facias* would be the appropriate remedy for the lord's breach of duty: but that point need not be discussed; for, the prosecutors, having raised the question by indicting for a nuisance, are bound in the first instance to establish all those circumstances upon which the alleged guilt depends. They must, then, shew that the old market place has, by law, ceased to exist. (They were then stopped by the Court.)

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against
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Lord DENMAN C. J. This is an indictment for an obstruction: and it appears that the defendant's act would be justifiable, except for the supposed removal of the market. The question therefore is, whether the market has been so removed as to make that use of the old market, which was proper before the removal, a nuisance. Now the removal is illegal, if the public have been deprived by it of any right. It is unnecessary to go through all the clauses of the lease, or discuss the several points which have been raised as to the rights in the soil and market. There is one clause which makes it impossible for us to say that the market has been well removed. A power is given to the lessees to impose rents, at discretion, for the licence and permission of vending, selling, and exposing to sale. There is no evidence that, in the old market, there was even any
rent

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rent for stalls, much less that it was certain, and least of all that there was any payment exacted for exposing to sale. That is so an essential an use of the market, that the creation of a discretionary power to exact payments for doing it cannot be sustained. I expected that the clause would end with giving the lessees the same power, as lords during the term, which the lessor had. But here is a discretionary power to impose rents; and, even as to the stallage, I am not prepared to say that, when that appears to have never been paid, a claim can be made to it by virtue of the ownership of the soil. A market may be beneficial to the grantee, though there be neither tolls nor stallage: it may be useful to him that the public should resort to the place, though without paying. A right to the market, therefore, does not necessarily give the power of exacting tolls. Consequently I am of opinion that the removal is not good; and that no nuisance has been committed by resorting to the old market, which still exists till a removal has been duly made.

LITLEDALE J. I agree in the construction put by my Lord upon the clause in the lease. But, independently of that point, I own that, if the lord had leased the site, granting to the lessees precisely the same powers which he himself had, I should have said that the market was not well removed. The market must still be held in the soil of the lord. It is true that the soil, if borough-english, would descend one way, and the right to the market another: that is the act of the law; but the division cannot be made by the act of parties. When the law creates the difficulty, we must deal with it as well as we can: and the principle of this distinction,

tion, between the act of law and the act of parties, has been recognised from *Wild's Case* (a) downwards. The lord is to have the correction of the market: but how can he have that when he has not the soil? It may perhaps be answered that the lease, substantially, gives nothing to the lessees but the correction. But how can the public know that? The lessees may indeed be liable to the Earl of *Burlington* for breach of covenant: but the public can take no advantage of it. The language of *Bayley J.* in *Mosley v. Walker* (b) shews that the lord must retain the power over the soil. I am of opinion, therefore, that the market was not well removed, the soil of the place to which it was removed having been parted with by the owner of the franchise. The lord could not, in such case, sue for the disturbance of the franchise; for the consideration which he gives to the public for the market is the correction which he exercises; and that he cannot exercise where he is not owner as well as lord.

PATTESON J. I think, on one short ground, that the market was not well removed. I take it to be quite clear that, when the lord removes, the new market must be as unrestricted and free as the old one. It is conceded that, in the old one, no market tolls were exacted from either buyer or seller. I do not enter into the question, whether the lord could now exact stallage: much less do I say that he could. But he gives the power to impose a rent in respect of selling: so that the public clearly would not have the same right in the new market as in the old one. Had

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against
SEABERT.

(a) 8 Rep. 78 b. See Co. Lit. 147. b., 164. b. (b) 7 B. & C. 85.

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against
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was not seen the lease, we might have had some doubt; but, on the terms of the lease, there can be none. If the lease had stopped at the words, "as now used in the open markets held in the said town," it might have been well enough; but afterwards come the words, "during which periods" &c., where the exemption from the necessity of licence by the lessees is expressly confined to the "buying and bartering," and the licence to sell is made subject to a discretionary rent.

WILLIAMS J. concurred.

Rule absolute.

Wednesday,
May 31st.

BREALEY, surviving Assignee of JOY, a Bankrupt, *against* ANDREW.

Declaration alleged that, before the making of the promise &c., defendant was indebted to *J.* in 200*l.* for money had and received; that a commission of bankrupt had issued against defendant; that, in consideration of the premises, and that *J.* would prove for the 200*l.* under the commission, de-

fendant promised *J.* to pay him that sum in a few months; that *J.* proved, but that defendant did not pay. A verdict was given on this count for *J.*'s representative.

Judgment arrested, on the ground that the count was founded on a promise without legal consideration; the Court refusing to presume that *J.*, in proving for money had and received, had waived a tort.

ASSUMPSIT. The declaration stated that defendant theretofore, and before *Joy* became a bankrupt, and before and at the time of the making of the promise &c., to wit on &c., was indebted to *Joy* in 200*l.* for money before then received by defendant for *Joy*'s use, and that, theretofore, and before the making of the promise &c., to wit &c., a commission of bankruptcy had been issued against defendant, and thereupon, to wit on &c., in consideration of the premises, and that *Joy* would prove the sum of 200*l.* against defendant's estate under the said commission, defendant

promised

promised *Joy* to pay him the said 200*l.* after the delay of a few months: yet although a long time, to wit five years, hath elapsed since the said promise, and although *Joy* did afterwards, to wit on the day and year last aforesaid, prove the said sum of 200*l.* against defendant's estate under the said commission, defendant hath disregarded &c., and hath not paid &c.

Issue being joined on pleas to this count, and the plaintiff having obtained a verdict (at the sittings in London after Michaelmas term 1835, before *Patteson J.*), a rule nisi was obtained, in the ensuing term, for arresting judgment, on the ground that the alleged contract was bad in law.

Sir *F. Pollock* (with whom was *Hoggins*) now shewed cause. It is not to be assumed that the promise declared upon was without legal consideration. Supposing, for example, that the defendant had obtained goods of *Joy* by a fraud, like that stated in *Abbotts v. Barry* (a), and had sold them: the plaintiff might have either brought trover, or sued for money had and received. Now it has been held that a certificate in bankruptcy is no bar to an action of trover, even where the party may, at his election, bring trover or assumpsit (b). If *Joy*, therefore, in this case, had been induced, under the circumstances supposed, to waive the tort and prove under the commission as for a debt, that was sufficient consideration for a promise by the defendant to pay the 200*l.* in full at a subsequent time. A promise to indemnify the plaintiff in consideration that he would

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against
ANDREW.

(a) 5 *B. Moore*, 98. S. C. 2 *Brod. & B.* 369.

(b) See *Parker v. Norton*, 6 *T. R.* 695.

become

1837. become assignee under a commission, to be issued against *A.* and *B.*, was held valid in *Gilmour v. King* (*a*), though given by the solicitor to the commission.

BARALET
against
ANDREW.

[No counsel in support of the rule was present.]

LORD DENMAN C. J. It is clear that this is a bad count. The only mode in which the contract can be made good is to suppose facts which are not alleged on the record. The statement is of a promise which could not bind the defendant's future property.

LITLEDALE J. concurred.

PATTERSON J. I do not say how the case might have stood, if the creditor, having two remedies, had waived one; but that is not alleged. The judgment must be arrested (*b*).

Judgment arrested.

(*a*) 1 Cro. & M. 612. S. C. 3 Tyr. 581.

(*b*) *Williams J.* was in the bail court.

Thursday,
June 1st.

TAYLERSON *against* PETERS and Another.

Tenant of a farm, having remained a few days after the expiration of his term, and after entry by a new tenant, went away, leaving a cow and some pigs, but giving no further intimation of a purpose to return, or to continue holding any part of the farm: Held, that the landlord could not justify distraining the goods so left for arrears of rent, under stat. 8 Ann. c. 14. ss. 6, 7.

TRESPASS for seizing and taking away cattle, goods, and chattels, of the plaintiff. Plea, the general issue. On the trial before Lord Denman C. J., at the York Spring assizes 1836, it appeared that the animals in question, a cow and some pigs, of the value, altogether,

of

of 17*l.* 16*s.*, were taken as a distress for rent due from the plaintiff for a farm and buildings. The plaintiff had duly received notice to quit on *May* 13th, 1835, when his time of holding expired. The distress was put in *May* 22d. Between *May* 13th and *May* 22d, the plaintiff, who still remained on the premises, was asked by *Welford*, the incoming tenant, whose term had commenced, when he meant to leave; he replied that he did not know; but before the distress he went away, removing part of his property, but leaving the cow and pigs on the farm. He did not ask *Welford's* permission to leave them; nor did he, in going away, state any thing as to his intentions. No question was specifically left to the jury as to the giving up of possession by the plaintiff (a). The new tenant entered, but did not obtain complete possession before *May* 22d. On that day, and before the distress was put in, he had possession of the whole farm, unless there was a continued possession by the plaintiff as after mentioned. A verdict was found for the defendant; but in the next term a motion was made (by leave reserved) to enter a verdict for the plaintiff. The only point raised, on which the Court ultimately gave any decision, was, whether the distress, made after the expiration of the term as above stated, was justified by stat. 8 *Ann. c. 14. s. 6. (b)*. A rule nisi having been granted,

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TATLSON
against
FARMER.

Cresswell

(a) The principal dispute in the case was on the authority of the parties who acted in making the distress.

(b) Stat. 8 *Ann. c. 14. s. 6.* "And whereas tenants pur auter vie and lessees for years, or at will, frequently hold over the tenements to them demised, after the determination of such leases: and whereas after the determination of such, or any other leases, no distress can by law be made for any arrears of rent that grew due on such respective leases before the determination thereof; it is hereby further enacted" &c., "that from and after" &c., "it shall and may be lawful, for any person or

1837.

TAYLORSON
against
PETERS.

Cresswell and *Wightman* now shewed cause. The plaintiff remained in possession of a part of the farm, by keeping his cattle there, down to the time of the distress. If nothing was left to the jury on this point, still the Court will not now assume that the plaintiff had wholly given up possession. It is true that he had removed part of his goods, but some remained. Will the Court say that, if he had merely withdrawn himself, the possession would not have continued? *Nuttall v. Staunton* (a) shews that, to render the statute applicable, it is not necessary for the tenant to continue occupying the whole premises, or to hold them adversely. There the tenant held on by the landlord's permission. In *Beavan v. Delahay* (b), where the tenant, according to the custom of the country, left his away-going crop in barns upon the farm after the expiration of his term, it was held that (independently of the statute) a distress might be made of the crop so left, the landlord's right continuing as to that part of the farm which the tenant still occupied.

Alexander and *W. H. Watson*, contra. It cannot be said that the old tenant continues to occupy when the new one has taken possession. Whatever possession of the old tenant is relied upon, to justify a distress under the statute, should be exclusive. At all events it should

or persons, having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined, to distrain for such arrears, after the determination of the said respective leases, in the same manner as they might have done, if such lease or leases had not been ended or determined."

Sect. 7. "Provided, that such distress be made within the space of six calendar months after the determination of such lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom such arrears became due."

(a) 4 B. & C. 51.

(b) 1 H. Bl. 5.

be

be in the character of tenant; but that is not kept up by merely leaving behind a few articles of property. In *Beavan v. Delahay* (a) and *Nuttall v. Staunton* (b) an actual tenancy continued as to part of the premises. Here the attempt is to set up a constructive one. *Welford*, the incoming tenant, had a right to full possession on *May* 13th; and it was, substantially, given up to him. He might have brought trespass against the plaintiff for leaving the animals on the farm.

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TAYLORSON
against
PETERS.

LORD DENMAN C. J. I think there was no possession by the plaintiff at the time of the distress. It might have been different if the cow and pigs had been left with a view of keeping possession, and of maintaining a right in the plaintiff to come back. A small thing, so done, might serve to shew a continuing possession. But here it would be unreasonable to construe the facts so. Though the cow and pigs remained till *May* 22d, the plaintiff was gone before the distress. The circumstances under which he went do not raise the inference of a continued possession, unless the mere circumstance of his leaving this property behind him be sufficient; and I think it is not.

LITLEDALE J. I am of the same opinion. The plaintiff's time expired on *Old May-day*; he is asked by the incoming tenant when he means to leave, and answers that he does not know; and then he goes away, under circumstances which appear to me to shew a complete abandonment. I think that the cow and pigs were not left with a view of keeping possession,

(a) 1 *H. Bl.* 5.(b) 4 *B. & C.* 51.

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TAYLORSON
against
PETERS.

but that the plaintiff had determined his possession by leaving the premises without any intention to return.

•PATTESON J. To bring a case within sect. 7 of the statute of *Anne*, the continuance of possession may be either tortious or otherwise. In *Nuttall v. Staunton* (a) it was by permission. In *Beavan v. Delahay* (b) the possession was continued under a custom. But, to make the statute applicable, there must be a keeping as the party's own, to the exclusion of other people. That fact is wanting here.

WILLIAMS J. The facts here negative the inference relied upon. The mere fact of the plaintiff's leaving these cattle does not shew a continuance of possession. It was an accidental circumstance, not indicating possession, nor accompanied by a claim of it.

Rule absolute.

(a) 4 B. & C. 51.

(b) 1 H. Bl. 5.

Thursday,
June 1st.

FIELD and Another *against* Woods.

The enactment of stat. 31 G. 3. c. 25. s. 19., that no bill, draft, or order, &c., shall be given in evidence or available in law unless the paper be lawfully stamped, is incorporated in stat. 55 G. 3. c. 184., by sect. 8.

In an action on a banker's cheque, the objection that it was post-dated and not properly stamped ought not to be specially pleaded.

Where a document produced on a trial would, from some defect, be inadmissible if objected to, the practice in general is, that, if such document has been put in and read, the objection cannot afterwards be taken. But where the defect requires extrinsic evidence to shew it, as where a cheque has been post-dated, the instrument is to be read, and the ground of objection afterwards proved as part of the defendant's case.

Conclusion

ASSUMPSIT against the drawer of a draft or order, commonly called a cheque on a banker, for 30*l.*, made payable to *W.* or bearer, and delivered by *W.* to plaintiffs, who thereby became the lawful bearers. Plea, that defendant did not make the said draft or order in the above count mentioned, in manner and form &c.

Conclusion to the country. Issue thereon. On the trial before *Williams J.* at the sittings in *London* after *Hilary* term 1836, the plaintiffs' counsel produced the draft in question, which was admitted, under a Judge's order (saving all just exceptions &c.), to be in the defendant's hand-writing; and it was read. The draft was unstamped. The defendant's counsel, in opening his case to the jury, proposed to prove that the draft was post-dated, for which reason, he contended, it could not be evidence, having no stamp. The learned Judge was of opinion that the post-dating was a defence which ought to have been pleaded; he therefore rejected the evidence offered for the defendant, and the plaintiff had a verdict. A rule nisi was obtained in the ensuing term for a new trial.

1837.

FIELD
against
WOODS.

Channell now shewed cause. First, the want of a stamp may render an instrument absolutely void (as in the case of indentures of apprenticeship under stat. 8 *Ann. c. 9. s. 39.*); or may operate merely to prevent its being read in evidence; as where a bill of exchange wants the stamp which, according to its tenor, it ought to have, or where the stamp duty is proportioned to the number of words, and a writing contains more words than the stamp will cover. There the objection is established without any reading in evidence; the Court, on its own view, pronounces that the document cannot be submitted to the jury. Here, the draft appeared to be made in the usual form of a banker's cheque. If the objection is directed against the reading of the document at all, the answer is, that the defendant should have interposed when it was put in, and stopped the reading. That was not done. [*Payne*, contra, stated

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against
Woods.

that he had begun to take the objection, but suspended it in consequence of an observation from the opposite counsel, not, however, meaning to waive it.] In a case some time ago, where counsel had suffered an objectionable document to be read, and a motion was afterwards made for a new trial, the counsel stating that his omission to object at the proper moment was accidental, this Court refused a rule to shew cause (*a*). [Lord *Denman* C. J. There the objection had

Wednesday,
May 28th,
1834.

(*a*) FOSS against WAGNER.

A written paper being offered in evidence by plaintiff, on a trial, defendant's counsel desired to see it; before it was handed to him, it was laid before the Judge, and afterwards, while the counsel's attention was accidentally diverted, and before the paper was handed to him, it was read in evidence. The Judge at *Nisi Prius* held that the counsel could not afterwards object to the want of a stamp, and the plaintiff having obtained a verdict, this Court refused to grant a rule nisi for a new trial, on counsel's statement of the above facts.

ASSUMPSIT for money lent, &c. Plea, non assumpsit. On the trial, before *Patteson* J., at the sittings for *Middlesex*, in *Trinity* term 1834, the plaintiff offered in evidence an unstamped paper, signed by the defendant, and addressed to the plaintiff, containing the words, "I. O. U. ninety pounds, having borrowed that sum of you this day. To be repaid within ten days." The defendant's hand-writing was proved, and the instrument handed up to the learned Judge: the senior counsel for the defendant had asked to see it; but he turned round, while the instrument was in the Judge's hands, to confer with the junior counsel for the defendant; and the instrument was put in and read without his observing it. He then again required to see it, and, upon its being put into his hands, he objected that it could not be received in evidence for want of a stamp. The learned Judge, however, let it go to the jury, and the plaintiff had a verdict, leave being given to move to enter a nonsuit.

Kelly now moved accordingly; but the Court intimated that he could not be heard on the question of the stamp, the instrument having been read in evidence without objection.

Kelly. The instrument, in strictness, should have been put into the hands of the defendant's counsel before it was read he having asked for it. It would be hard to make the defendant suffer from a momentary inattention on the part of his counsel, which would not have prejudiced him if the paper had been shewn when first required.

Lord DENMAN C. J. It appears to me that we ought not to hear this objection now. We might, perhaps, be of opinion that the instrument requires a stamp; but it is clearly one which, in itself, binds the maker; and I should regret to find that the want of a stamp excluded it from being produced. By an accidental circumstance, it has been read in evidence,

had not been discovered when the paper was read: here counsel appears to have been furnished with the objection.] This point is not further pressed if the opinion of the Court is against it. Then, secondly, this defence ought to have been specially pleaded, according to *Reg. Gen. Hil. 4 W. 4, Pleadings in particular actions*, I. *Assumpsit*, 1. (a). [Patteson J. The plea is, that the defendant did not make the said draft or order; and the defence raised by the facts is, that no banker's cheque was made; for the effect of stat. 55 G. 4. c. 184. sched. part I., as to drafts on bankers, payable to bearer on demand, is that they shall not be bills of exchange for the purposes of the act, provided, among other things, they be properly dated.] The rule just referred to directs that, "in all actions of assumpsit, except on bills of exchange and promissory notes, the plea of non assumpsit shall operate only as a denial in fact of the express contract or promise alleged, or of the matters of fact from which the contract or promise alleged may be implied by law." This is not an action on a bill of exchange or promissory note. Drafts on bankers are mentioned as a distinct species of security in the schedule to the Stamp Act. By the new rules, (under the

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against
WOODS.

evidence, before any objection was taken. The reason which principally weighs with me against going into the point of law now is, that the recollection which gentlemen of the bar have of matters taking place during a trial at Nisi Prius often varies very much; and, if we allowed discussions of this kind, we should find counsel on opposite sides, with perfect bona fides, contradicting each other as to facts, which would be unpleasant both to us and to them. And there is no reason to regret that, by accident, such an instrument as this should have got on the Judge's notes.

LITTLEDALE, TAUNTON, and WILLIAMS Js. concurred.

Rule refused.

(*) 5 B. & Ad. vii.

I 3

head

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 against
 Woods.

head already cited, rule 3) "all matters which shew the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded." The defence here tends to shew that a contract, express in its terms, is bad in law, being made in wilful contravention of the statute, which, by sects. 12, 13, imposes penalties for making and issuing post-dated bills or drafts on bankers unless duly stamped. It is a defence founded on an alleged illegality not apparent on the cheque itself; a defence, therefore, not arising on the plaintiff's case, but requiring to be supported by new and independent facts. It ought, then, to have been pleaded. Lastly, by the Stamp Act, 31 G. 3. c. 25. s. 19., it was enacted that no bill, note, draft or order liable to the duties imposed by that act should "be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity," unless stamped. That enactment is not continued by stat. 55 G. 3. c. 184. expressly or impliedly, unless such an effect can be given to sect. 8 (a), which is at least doubtful. It was held

(a) Stat. 55 G. 3. c. 184. s. 8. enacts, "That all the powers, provisions, clauses, regulations and directions, fines, forfeitures, pains and penalties, contained in and imposed by the several acts of parliament relating to the duties hereby repealed, and the several acts of parliament relating to any prior duties of the same kind or description, shall be of full force and effect with respect to the duties hereby granted, and to the vellum, parchment and paper, instruments, matters and things, charged or chargeable therewith, as far as the same are or shall be applicable, in all cases not hereby expressly provided for, and shall be observed, applied, enforced and put in execution for the raising, levying, collecting and securing of the said duties hereby granted and otherwise relating thereto, so far as the same shall not be superseded by, and shall be consistent with the express provisions of this act, as fully and effectually to all intents and purposes, as if the same had been herein repeated and specially enacted with reference to the said duties hereby granted."

in

in *Allen v. Keeves* (a) and *Whitwell v. Bennett* (b), under stat. 31 G. 3. c. 25., that a post-dated cheque was bad for want of a stamp; but in *Upstone v. Marchant* (c) and *Williams v. Jarrett* (d), under stat. 55 G. 3. c. 184., this Court decided that a post-dated bill of exchange might be given in evidence, where the stamp corresponded with the date actually upon the face of the bill, though it was proved that the date was put on by anticipation. So a cheque offered in evidence will be considered, for that purpose, as having been issued on the day of which it bears date, although, if it be in fact post-dated and unstamped, the party issuing may be liable to a penalty under sect. 13. of stat. 55 G. 3. c. 184.

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Payne, contra. As to the first point; the defect insisted upon was not, properly speaking, a part of the defendant's case: it was an infirmity in the plaintiff's case, pointed out by the defendant; and whether it appeared intrinsically in the instrument itself, or extrinsically by evidence relating to it, was unimportant. The evidence could not be given so as to break in upon the plaintiff's case; but the time of its being offered was immaterial: if upon the whole case the Judge sees that evidence for the plaintiff has been improperly received, he will strike it out: *Jones v. Fort* (e). The case differs entirely from those in which a defendant has, by laches, allowed an instrument to be read which has an intrinsic defect. Here the defect could not be exposed till it came to the defendant's turn to offer evidence. *Allen v.*

(a) 1 *East*, 435.

(b) 3 B. & P. 559.

(c) 2 B. & C. 10.

(d) 5 B. & Ad. 32.

(e) *Moo. & M.* 196.

1637.

 FIELD
 against
 Woods.

Keeves (a) is in point; there the draft (which was declared upon as a bill) was held inadmissible because not within the exempting clause, sect. 4, of stat. 31 G. 3. c. 25., which, as to dating, is nearly the same with that in sched. I. to stat. 55 G. 3. c. 184. *Whitwell v. Bennett (b)* supports *Allen v. Keeves (a)*. In *Williams v. Jarrett (c)* the bill had a stamp; and the question which the defendant attempted to raise was as to its sufficiency, not as to the terms upon which a bill is exempted from stamp duty. As to the plea, the objection to the instrument here tendered is, that, supposing stat. 31 G. 3. c. 25. to be incorporated with the present act, a draft post-dated and unstamped is, by sects. 2, 4, and 19, inadmissible in evidence. But it would be improper to plead that a document is not evidence. *Dawson v. Macdonald (d)* and *M'Dowall v. Lyster (e)* shew that the plea here pleaded is the right one. That which is to be pleaded is matter of defence; the objection here relied upon was not so, inasmuch as it turned upon a failure in the plaintiffs' case, though demonstrated by evidence on the part of the defendant. Whether it was to appear by such evidence, or by inspection, or by cross-examination of a witness for the plaintiffs, could make no difference as to the form of pleading. Stat. 55 G. 3. c. 184. s. 8. clearly incorporates the provision of stat. 31 G. 3. c. 25. s. 19, which makes drafts not properly stamped inadmissible in evidence. That is at least a "provision" to be enforced (according to the language of the former clause) for "securing" the duties granted by stat. 55 G. 3. c. 184.

(a) 1 *East*, 435.(c) 5 *B. & Ad.* 32.(e) 2 *Mec. & W.* 52.(b) 3 *B. & P.* 559.(d) 2 *Mec. & W.* 26.

Lord

LORD DENMAN C. J. I cannot distinguish the present case from *Dawson v. Macdonald* (a). That case had not been decided when this was tried. Had it then been decided, I have no doubt that my brother *Williams*, if it had been cited, would have yielded to its authority. The plaintiffs proceed upon an instrument which appears *primâ facie* good; but then, upon the evidence at the trial, something arises which makes a stamp requisite. In *Dawson v. Macdonald* (a) the action was brought on a bill of exchange; the defendant had found that the bill was written on paper improperly stamped, and he attempted to plead that fact in addition to a plea of non-acceptance; but *Parke* B. said, "The only consequence of the wrong stamping is, that the instrument cannot be given in evidence." There can be no question that this defence is admissible under a plea that the defendant did not make the draft.

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against
WOODS.

LITLEDALE J. If it were true that stat. 55 G. 3. c. 184. s. 8. did not embody the clause of stat. 31 G. 3. c. 25. s. 19, making drafts which require a stamp inadmissible if unstamped, there might be some doubt in this case; but the words are large enough, though they certainly might have been more full. Then is the objection one which it is necessary to shew in pleading? I think not. The acts being prohibitory, the moment the cheque was produced, if the defect appeared, the Judge would say that he could not allow the document to be received. Here, however, it was received: and the objection was not made apparent till the opening of the defendant's case, when he offered evidence to shew the

(a) 2 *Mec. & W.* 26.

defect.

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defect. The practice has been, lately, that, if a document was once read, an objection should not be taken to it afterwards: but that has been where the defect appeared on the document itself, as where the stamp was too small compared with the terms of the instrument or the number of words: those are different cases from the present, where the objection arose on matter extrinsic, and the Judge could do nothing, in the first instance, but admit the document, subject to an objection to be raised afterwards by proof. It does not follow that it was necessary to state the objection in pleading: and that is decided by the case in the Exchequer, which is the same in effect with the present, though it turned on another statute.

PATTESON J. There is no doubt that stat. 55 G. 3. c. 184. s. 8. incorporates sect. 19 of stat. 31 G. 3. c. 25. Then, by that section, no draft not lawfully stamped "shall be pleaded or given in evidence in any court, or admitted in any court to be good, useful, or available in law or equity." Supposing, therefore, that the document here had been given in evidence, the acts say that it shall not be available. But it was given only as evidence *prima facie*, and subject to the objection which was raised by extrinsic evidence. By the Stamp Acts all bills, drafts, or orders for the payment of money, are, in the first instance, liable to stamp duty; but then an exemption is given to drafts on bankers residing within ten miles (a) of the place where the draft is issued, provided, first, such place be specified in such draft. It would appear by the draft itself whether that requisite

(a) See stat. 9 G. 4. c. 49. s. 15.

was fulfilled or not. Then follows another proviso, that the draft shall bear date on or before the day on which the same shall be issued. To ascertain whether that condition is fulfilled or not, there must be extrinsic evidence; and such evidence, to invalidate the draft, must be given by the defendant. Therefore such a draft is not "given in evidence," because it has been merely read as part of the plaintiff's case. Then, is it necessary to plead the facts which make such a draft not receivable in evidence? There is nothing in the new rules that can require it. The objection is, in effect, that the draft on which the action is brought was not an instrument available at all. The defence is not one which admits the contract and takes off its effect. *Dawson v. Macdonald* (a) is not distinguishable, in substance, from this case.

1837.

 FIELD
 against
 Woods.

WILLIAMS J. concurred.

Rule absolute.

(a) 2 Mee. & W. 26.

1837.

Monday,
June 1st.

LISTER *against* LOBLEY and FARRER.

By a turnpike road act, trustees were authorised to enter upon and take certain lands, and to pull down certain houses, buildings, &c., "making or tendering satisfaction to the owners or proprietors of all

private lands, houses, buildings," &c., so taken, "for any loss or damage they may sustain thereby;" and it was also provided, that they should not be authorized to take other buildings, &c., without the consent "of the owners or proprietors thereof, or other persons interested therein." Held,

1. That compensation was to be made, in the case of premises taken under the former clause, not only to the owners of the fee simple in the lands and buildings, but also to lessees of the same for terms of years.

2. That the trustees were not bound by the above clause to make or tender compensation before or at the time of entering upon or taking the lands, or pulling down the houses.

TRESPASS for breaking and entering plaintiff's closes, destroying certain buildings, &c., of plaintiff, and expelling him from the possession, and keeping and continuing &c.

Pleas. 1. Not Guilty. 2. That the said closes, &c., were described and mentioned in the schedule annexed to an act &c. (stat. 5 W. 4. c. xxxvi. (a)), and that the

(a) Stat. 5 W. 4. c. xxxvi., local and personal, public, "For repairing and maintaining the road from" &c., "and for making and maintaining a new road from the aforesaid road at *Swallow Hill* in the township of *Wortley* to *Pudsey*, all in the West Riding of the County of *York*."

Sect. 5 appoints trustees for making, amending, altering, improving, and keeping in repair the said *Wortley* and *Pudsey* district of road, and for otherwise carrying the act into execution with respect to the said district.

Sect. 25 empowers the said trustees, "and they are hereby authorised and empowered and required, to make the said new road hereinbefore mentioned and described upon, in, over, and through any land or grounds or hereditaments, of such width" &c.; "and for such purpose or purposes it shall and may be lawful for the said trustees," "and all persons acting under their authority, and they are hereby authorized and empowered, to enter upon and to take and use the lands and premises upon, over, or through which the line of the said road is laid down or described" in a map or plan and book thereinafter mentioned, "and also to take and use or pull down and remove the houses, buildings, tenements, hereditaments, and premises described or mentioned in the schedule to this act annexed, any law or statute to the contrary notwithstanding, making or tendering satisfaction to the owners or proprietors of all private lands, houses, buildings, tenements,

the trustees for making, &c., the *Wortley and Pudsey* district of road, and for otherwise carrying the act into execution, having occasion to take and use the said closes in which &c., and to pull down and remove the said buildings, &c., being respectively part of the premises in the schedule mentioned, for the purpose of making the new road in the act mentioned, defendants, by and under the authority of the trustees, and by their command (the said trustees having, before and at the said time when &c., made satisfaction in that behalf to the owner of the said closes and buildings), for the purpose of making the said road, broke and entered &c., as they lawfully might, &c.

Replication to plea 2. That, though true it is that the trustees did authorize and command &c., nevertheless &c. (*de injuriâ* as to the residue).

On the trial before Lord *Denman* C. J., at the *York Spring* assizes, 1836, it appeared that the premises in question were private lands and buildings comprehended in the schedule; that the plaintiff held them for a term of years; that the defendants had taken and used the lands, and pulled down the buildings, for the purposes of the act, and had made satisfaction to the owner of the fee simple, which the latter had accepted; but that

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against
LOBLEY.

tenements, and premises so taken or used for the same, or for any loss or damage they may sustain thereby."

Sect. 28 enacts, "That the powers and authorities given by this act for making the said new road shall not extend or be construed to extend to authorize the said trustees to take or pull down any dwelling-house or other building, or to take in or make use of any curtilage, orchard," &c., "without the consent in writing of the owners or proprietors thereof or other persons interested therein first had and obtained, except such as are mentioned in the schedule to this act annexed."

(The local act contained no provision for ascertaining the satisfaction to be made to owners or proprietors of houses, &c., taken under sect. 25.)

NO

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 against
 LOBLEY.

no compensation had been made or tendered to the plaintiff.

For the defendants it was argued, first, that the statute was satisfied by compensation having been made to the owner of the fee; and, secondly, that, assuming the plaintiff to have been entitled to compensation, he should have proceeded under the statute to enforce it, and could not bring trespass against the defendants for entering without having made it. The Lord Chief Justice directed a verdict for the plaintiff, reserving leave to the defendants to move on each point. In *Easter* term 1836 (a),

Cresswell moved to enter a nonsuit, or for a new trial. As to the first point, the defendants have complied with sect. 25 of stat. 5 *W.* 4. c. xxxvi., having made "satisfaction to the owners or proprietors." [*Coleridge* J. By sect. 83 of stat. 3 *G.* 4. c. 126. (which, by stat. 9 *G.* 4. c. 77. s. 19., is incorporated in this local act), the trustees and their workmen are protected from being treated as trespassers upon lands, &c., they "tendering and making satisfaction to the owners thereof, and persons interested therein, for the damage they shall sustain." How is that condition fulfilled here?] It does not appear that the protection there is dependent upon the satisfaction having been made: it may be made at any time: indeed the amount to be tendered or paid may not be always ascertainable before the entry. But at any rate stat. 5 *W.* 4. c. xxxvi. s. 25. expressly gives the power of entering and using, after satisfying the owners or proprietors. [*Coleridge* J. The "other persons interested" are also mentioned in stat. 5 *W.* 4. c. xxxvi. (b)] That

(a) *Monday, April* 18th.

(b) See sect. 28, *antè*, p. 125, note.

circumstance

circumstance is in favour of the defendants; for it shews that the neglect of such mention in sect. 25 must have been intentional. The reason of the omission seems to be, that it would be difficult for the trustees to find out all interested parties: they are therefore to make compensation to the owners or proprietors for the full value of the land, not for such value diminished by partial interests of others. Persons partially interested are to have recourse to the owners for their share of the compensation paid. [*Coleridge J.* In an action under stat. 2 & 3 *Ed.* 6. c. 13. s. 1. the declaration states the plaintiff to be proprietor of the tithes: is not that satisfied by proof that he is lessee " (a) ?] No one besides the lessee has any right to the tithes which are the subject of the action: but, in general, the owner or proprietor of land is the tenant in fee. [*Littledale J.* Suppose there were a lease of lands for 999 years at a nominal rent.] Such a case could certainly not be distinguished. Wherever the legislature intends to refer to parties interested, other than the owners of the fee-simple, it does so expressly.

(He then argued the second point.)

LORD DENMAN C. J. As to the first point, it appeared to me at the trial, and it does so most clearly now, that the plaintiff was an "owner or proprietor," for the purpose of receiving satisfaction. The words have no definite legal meaning. They may refer to owners having either the whole, or partial interests. These are, properly speaking, owners in each case. It would be inconvenient and unjust if the trustees were

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against
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(a) See *Stevens v. Aldridge*, 5 *Price*, 334.

required

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required to make satisfaction to the tenant in fee "for any loss or damage" which another party might sustain. The person having a partial interest can recover in no character except that of owner or proprietor. I admit that a strong argument may be raised on the circumstance that in another part of the statute, there is express mention made of "other persons interested," in addition to the "owners or proprietors," and that in sect. 25 there are no such additional words. But I think that we cannot here draw as strong an analogy from such a circumstance as we might in the case of a general statute. Therefore, I am of opinion that stat. 5 W. 4. c. xxxvi. is not satisfied without compensation being made or tendered to the lessees.

As to the second point, it seems to depend upon a very nice interpretation; and we should desire to look into it further. Perhaps the best way will be to state a case.

LITLEDALE J. As to the first point, it seems clear to me that the plaintiff comes within the words "owners or proprietors." These are not legal terms; but they must be understood from their ordinary use. I do not see that "owner" necessarily means the tenant in fee-simple. In common sense one would ask, Whose is the land? Who has the beneficial rent? If there be a nominal rent, how can the tenant in fee-simple be the owner? Suppose there were a lease for ninety nine years, with no rent reserved: in common sense, you would call the lessee the owner. The word "owners" has therefore no definite meaning. So as to the word "proprietors." That word, in a declaration on stat. 2 & 3 Ed. 6. c. 13. s. 1., is satisfied by proof that

that a party is a lessee of the tithes. Mr. *Cresswell* suggests that this is distinguishable, inasmuch as the tithes are the absolute property of the lessee, whereas the premises here are not so. That may perhaps be so: but the instance at any rate shews that the word "proprietor" may mean interests of different kinds. Then, as the words "owners or proprietors" here have no definite legal signification in themselves, we must take them to mean parties who have any interest. Both here, and under the general Turnpike Act, the general principle clearly is, that compensation shall be made for loss or damage to any parties interested. Now a party sustains damage by loss of profits. In the case of a long lease, the owner of the fee-simple may sustain no damage at all. It appears to me, therefore, that the words must be understood, *reddendo singula singulis*, of compensation to be made to owners of every species of interest, according to its amount.

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PATTESON J. I entertain no doubt that the words "owners or proprietors," in stat. 5 *W.* 4. c. xxxvi., include tenants for terms of years; and that such tenants are to receive compensation for "any loss or damage they may sustain." The plain meaning must be, that any person who suffers is to have satisfaction. The words "other persons interested" occur in another part of the statute; but that has very little weight with me. I never saw a local act which, upon inspection, did not contain variations of this sort. We must collect the general meaning. Mr. *Cresswell* says, that compensation is to be given to the landlord for all the loss, and that the landlord and tenant are to settle between themselves. I should

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assent to this, if I could find any clause enabling the tenant to recover in this way: but, as there is no such clause, and as it could not have been intended to leave the tenant without remedy, I must infer that the meaning was that every owner, *reddendo singula singulis*, should receive satisfaction for his own share.

COLERIDGE J. I have had more doubt than the rest of the Court. I am always anxious not to allow too much weight to the inconvenience arising in any particular case. I disclaim being now influenced by such a consideration, and shall endeavour to ascertain the meaning from the act itself. It is not to be construed like a general act, but, being local and personal, against the parties upon whom the powers are conferred. The intention of sect. 25 is to give compensation. I should therefore infer that the words "owners or proprietors," there used, extend to all parties injured, since they are the parties requiring compensation. The meaning, therefore, I consider to be, that all shall be entitled to compensation who have interests which are prejudiced by the act done.

Rule refused on the first point; granted on the second, unless the parties agree to state a case.

The parties not agreeing upon a case,

Crompton now shewed cause against the rule, and contended, first, that the defendants could not avail themselves of the general turnpike acts, 3 G. 4. c. 126., 4 G. 4. c. 95., or 9 G. 4. c. 77, to introduce special matter of defence under the plea of the general issue,
 or

or for any other purpose, inasmuch as the evidence shewed that, in committing the trespasses, they had proceeded under the local act, and not under the general ones. [He then entered into a comparison of the general acts with the local statute, for the purpose of shewing that the defendants' proceedings, as proved on the trial, had been taken under the latter only.] But, assuming that any defence under the local act can now be gone into, under the plea of the general issue, it is not correct to say that the plaintiff's only remedy is by a direct proceeding for compensation. Trespass is the proper remedy. The trustees should have tendered amends before or at the time of entering upon the land; for stat. 5 W. 4. c. xxxvi. s. 25. only empowers them to enter upon and take and use lands, and to remove buildings, "making or tendering satisfaction to the owners or proprietors." Unless they do so they are trespassers in entering. It cannot perhaps be said that the act imposes a condition precedent; but it gives a limited authority. The trustees are to enter, tendering satisfaction, not otherwise. The statute itself provides only this security for compensation to the landowners: as to other remedies, it may be collected from *Boulton v. Crowther* (a) that case would not lie against the trustees for consequential injury resulting from their acts done in pursuance of the statute; and, according to the opinion expressed there by *Littledale J.*, assumpsit would not lie against them on an implied promise to make compensation. The qualification here, "making or tendering" &c., forms part of the same sentence which gives the power to enter. The case differs

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(a) 2 B. & C. 703.

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from *Boyfield v. Porter* (a), where it was held, under the general Highway Act, 13 G. 3. c. 78. sects. 27 and 29, that a surveyor sued in trespass for taking materials from land was protected by a subsequent tender of amends. There the provision in sect. 27, that satisfaction should be made for damages, was contained in an independent clause; and the language of the statute differed in other respects from that of the local act now in question. In *Thomas v. Cadwallader* (b) the plaintiff, as lessor, declared upon a covenant by the defendant, as lessee, to repair, the plaintiff finding timber; and the declaration was held to be bad, because it stated the non-repair without averring that the plaintiff was always ready to find timber. This is not like the cases (as the *Sir Carpenters' Case* (c) and others there referred to) where it has been held that omitting to do something after entry shall not make a man a trespasser ab initio. The complaint here is of things done, as pulling down buildings. The word "tendering" in sect. 25 of stat. 5 W. 4. c. xxxvi. implies something to be done before the mischief, and distinguishes this case from *Boyfield v. Porter* (a), where "satisfaction" was to "be made," and, if not agreed upon, to be assessed by a justice.

Cresswell, contra, as to the first point taken, cited stat. 9 G. 4. c. 77. s. 19., as embodying (with the exceptions there mentioned) the provisions of that and the preceding general turnpike acts in every local turnpike act, as if re-enacted therein. Then as to the words of the local act, "making or tendering satisfaction." Their effect is, that the trustees shall be authorised to do

(a) 13 East, 200.

(b) *Willes*, 496.

(c) 8 Rep. 146 a.

the

the work, but shall be compellable to make compensation. It is said that there is no power to compel them, after the act is done ; but, if that were so, the Court would probably grant a mandamus. It must often be impossible to ascertain beforehand the damage that will be done. (He was then stopped by the Court.)

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LORD DENMAN C. J. I do not see how the last observation can be answered. The amount of compensation cannot, generally, be ascertained till the work is done. The effect of the words in question is, that they shall not do it without being liable to make compensation.

LITTLEDALE J. I am of the same opinion. There may be a damage done which was not intended. The lord of a manor often has a power reserved to him to enter lands and dig mines, making compensation ; but, in justifying under such a right, he need not plead that he made compensation before entering.

PATTESON J. concurred.

WILLIAMS J. I am of the same opinion. Words authorising trustees to enter lands and remove buildings, "making or tendering satisfaction," cannot render them trespassers ab initio, if they omit to make or tender it.

Rule absolute for a new trial.

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*Friday,
June 2d.***RIDLEY against TINDALL and Others.**

When defendant in assumpsit pleads that he paid, and plaintiff accepted, monies in full satisfaction, a replication alleging that plaintiff did not accept the monies in full satisfaction puts the payment as well as the acceptance in issue.

ASSUMPSIT for work and labour and commission, money lent, money paid, and on an account stated. Plea, as to 1*l.* 12*s.*, 20*l.*, and 1*l.* 9*s.*, parcels of the sum demanded, that, after the making of the promise &c., as to those sums, and before the commencement of this suit, to wit on &c., defendants paid plaintiff the said several sums of &c., in full satisfaction and discharge of the said several sums of &c., and of the said promise &c. as to those sums, and of all damages sustained by plaintiff by reason of the non-performance of such promise as to those sums; and which said sums of &c. plaintiff then accepted and received of and from defendants in full satisfaction of the said several sums of &c. And, as to the residue of the sums mentioned in the declaration, non assumpsit.

Replication, as to the sums of 1*l.* 12*s.*, 20*l.*, and 1*l.* 9*s.*, that plaintiff did not accept or receive the said sums of and from defendants in full satisfaction of the said several sums of &c., parcel &c., and of the said promise in the declaration mentioned as to those sums, and of all damages &c., in manner and form &c. Issue thereon. Nolle prosequi as to the residue.

On the trial before Lord *Denman* C. J., at the *Newcastle* Spring assizes, 1836, the dispute was, whether a settlement of account, proved to have taken place between certain parties, was in effect a payment by the defendants to the plaintiff. It was urged, on behalf of the defendants, that, as the replication traversed only the

the acceptance in satisfaction, the plaintiff was not at liberty to dispute the payment. Another point was also insisted upon, which it is unnecessary to state. The plaintiff was nonsuited, but leave given to move on both the points to enter a verdict for him.

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Cresswell now shewed cause, and contended, first, upon the facts, that there were both a payment and an acceptance in satisfaction, and, secondly, that the replication put in issue, not the payment itself, but only the acceptance in satisfaction.

Alexander and *W. H. Watson*, contra. As to the pleading, *Webb v. Weatherby* (a) is decisive. There a plea that the defendant did not pay in full satisfaction &c., nor did the party represented by the plaintiff accept in full satisfaction &c., was held not to be double. *Tindal* C. J. said there, "This is not a plea of accord and satisfaction, but of a payment received in satisfaction of the plaintiff's demand; the receipt in satisfaction virtually implies that the payment was made in satisfaction." The facts there constituted but one defence. So here, if there was an acceptance in satisfaction, there was a payment likewise; if the one is denied, the other is so too. In a replication to a plea of accord and satisfaction, it has not been usual to deny both the delivery, or payment, and the receipt in satisfaction. [*Patteson* J. The old way was to protest one.] And it is said in *Com. Dig. Accord*, (C), that, "If a man plead an accord, the safest way is to plead it as a satis-

(a) 1 *New Cas.* 502.

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faction and not by way of accord; and therefore he need say no more, than that *the defendant gave so much to the plaintiff in satisfaction, which the plaintiff received.*"

Lord DENMAN C. J. It was essential to the defendants' case that the money should have been paid; and that was put in issue by the replication. The authorities are clear. [On the other point, involving the question whether a payment had or had not actually taken place, his Lordship's opinion was with the plaintiff.]

LITTLEDALE, PATTESON, and WILLIAMS Js. concurred.

Rule absolute (a).

(a) See *Crisp v. Griffiths*, 2 Cro. M. & R. 159. S. C. 5 Tyrwh. 619.

Saturday,
June 3d.

Sir FRANCIS BURDETT, Bart. *against* WITHERS.

Assumpsit on a promise, by a tenant, to keep premises in good and sufficient repair; and breach by not so keeping. Plea, payment of 5*l.* into Court, and no further damage.

On an issue taken upon such plea, the defendant is entitled to prove at the trial what the state of the premises was at the time of the demise.

ASSUMPSIT. The declaration stated that heretofore, to wit 29th *September* 1827, defendant became tenant to plaintiff of certain farms, upon the terms, among others, that defendant should, during the tenancy, keep all the premises in good and sufficient repair at his own expense; and, in consideration thereof, defendant promised plaintiff that he would, during the continuance of the tenancy, keep all the premises &c. (as before): that defendant became tenant, &c.:

breach,

breach, that he did not keep &c., and at the end of the term yielded the premises up in bad repair. Plea, that the plaintiff ought not further &c., because the defendant brings into Court 5*l.*, and plaintiff has not sustained damages to a greater amount. Replication, that the plaintiff has sustained damages to a greater amount. Issue thereon. On the trial before *Alderson B.*, at the *Berkshire* Spring assizes, 1836, the plaintiff produced evidence to shew the bad state of the premises at the time of the defendant's quitting. The defendant's counsel cross-examined as to the state of the premises at the time of the defendant's coming into possession: but the learned Judge, being of opinion that this was not relevant to the issue, stopped the cross-examination, and refused to admit evidence for the defendant on this point; and he said, in his charge to the jury, that they must estimate the damages on this issue at the sum which it would cost to put the premises into tenantable repair, without reference to the state in which the defendant found them. Verdict for the plaintiff; damages 162*l.* 10*s.* In *Easter* term, 1836, *Cooper* obtained a rule nisi for a new trial, citing *Harris v. Jones* (a) and *Gutteridge v. Munyard* (b).

Ludlow Serjt. now shewed cause. By the form of the issue the liability is admitted; so that, if the damages exceed 5*l.* by any sum, the Court can only reduce the damages. The cases cited on moving for the rule were discussed in *Stanley v. Towgood* (c), where, in an action on a covenant to keep and leave in good

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 against
 WITHERS.
(a) 1 *M. & Rob.* 173.(b) 1 *M. & Rob.* 334.(c) 3 *New Cas.* 4.

and

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and tenantable repair, it was held that, although a jury should be allowed to take into consideration whether the house was new or old, the state of repair at the time of the demise was not to be considered. Here the tenant purchased his term by agreeing to keep in good repair: after that, he is not to be allowed to shew that the state of the premises was bad, he having made his contract.

• *Cooper*, contra, was stopped by the Court.

Lord DENMAN C. J. The verdict might have been for the defendant if the evidence had been submitted to the jury. It is very material, with a view both to the event of the suit, and to the amount of damages, to shew what the previous state of the premises was. We cannot reduce the damages; for we have no means of forming an estimate.

LITLEDALE, PATTESON, and WILLIAMS Js. concurred.

Rule absolute.

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Ex parte LEE.

Saturday,
June 3d.

MANNING, in last *Easter* term, moved (a) for a mandamus to the corporation of *Lyme Regis* to assess compensation to *Henry Trotman Lee*, for the office of town clerk of that borough. The facts, as stated by Mr. *Lee*, were as follows. Mr. *Smith*, town clerk of *Lyme*, died, *August* 21st, 1835. On the 31st Mr. *Lee* resigned the office of capital Burgess, and was appointed (in the usual mode) town clerk in the room of *Smith*, and was duly sworn in, the said 31st *August* being the first of the usual prescriptive days for such election after *Smith* died. The tenure of the office was for life, no appointment otherwise than for the holder's life being known (b). *Lee* had performed the duties gratuitously in *Smith's* absence, for several years before he died. Shortly after the appointment, the act for regulating municipal corporations passed (c).

By a minute of the Lords of the Treasury, *September* 10th, 1835, it was declared that the principle adopted in stat. 11 G. 4. and 1 W. 4. c. 58. (which provided for compensation to law officers whose offices were to be abolished) might fairly be applied to the cases of town council has refused any compensation. But, Held that, under the circumstances, none but a nominal compensation was to be expected; and that, in such a case, the Court would not grant a mandamus to the corporation to assess compensation.

Quære, whether this Court can review a decision of the Lords of the Treasury under sect. 66 of the act, if made within their jurisdiction.

The town clerk of a borough dying, one of the capital Burgess vacated that office, and was appointed town clerk, nine days before the passing of the Municipal Corporation Act, 5 & 6 W. 4. c. 76. On *January* 1st he was removed. He applied to the town council for compensation, and they refused to grant any. He then appealed, under sect. 66 of the act, to the Lords of the Treasury, who decided that he was entitled to no compensation.

Quære, whether the Lords of the Treasury have jurisdiction, under stat. 66, where the town

(a) *May* 8th. Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Coleridge* Js.

(b) The minute of appointment did not specify any period for which the office was to be held.

(c) *September* 9th, 1835.

clerks;

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clerks ; and that, in all cases where such officer held his office for life, or the usage had been such as to raise a just expectation that the office would continue for the holder's life, a compensation of not less than two thirds might be granted to such officer, estimated as therein mentioned.

On *January* 1st, 1836, Mr. *Lee* was removed from the office of town clerk, and another person appointed. He applied for compensation under the act, claiming 1513*l*. The claim was calculated with reference to the above-mentioned Treasury minute. The council answered that, under the peculiar circumstances of his election, they could not award him any compensation unless under the direction of the Lords of the Treasury. He accordingly presented his claim to the Lords Commissioners in the manner directed by the act, sect. 66. He received a communication in answer, enclosing a letter to the Lords Commissioners from the town clerk on behalf of the council, which stated that they had rejected Mr. *Lee's* claim because he had previously been a capital burgess, and because, at the time of his appointment, the act for regulating corporations had passed the House of Commons, and had, with certain modifications, received the sanction of the House of Lords, and its provisions were well known : that the selection of a capital burgess for town clerk, when there was no probability of his being continued in office under the act, was considered an attempt to harass the future town council, &c. The Lords Commissioners, in their communication enclosing this paper, desired to receive such observations as Mr. *Lee* might think proper to submit ; and he sent a letter to them in answer (which was set forth in his affidavit), replying in detail to the reasons alleged by the town clerk. In *October* 1836, he
received

received from the Lords Commissioners a copy of a Treasury minute, which, after adverting to the statute, and to the documents before their Lordships, proceeded thus: — “My Lords advert to the case as it appears from the different statements of the parties. The appointment of town clerk does not contain any specific tenure under which he should hold the office. By the charter, it would appear that such tenure was during good behaviour; but by prescriptive usage, under which it was contended Mr. *Lee* was appointed, the tenure was for life. My Lords observe that, in the report of the Commissioners on Municipal Corporations, it is stated to be held for life. The office became vacant on the 21st of *August* 1835: and on the 31st of that month Mr. *Lee* resigned his office of capital burgess, and was elected town clerk. My Lords advert to the fact that the Municipal Corporation Act had passed the House of Commons, and been read a second time in the House of Lords previous to Mr. *Lee*’s appointment. My Lords are willing to consider the claims of those town clerks who accepted such appointments upon a just expectation that such situations should continue for life; but, considering that, previous to Mr. *Lee*’s appointment, the Municipal Corporation Act had been long before the legislature and the public, had already been sanctioned by the House of Commons, and been read a second time in the House of Lords, my Lords cannot but consider that Mr. *Lee* accepted his office with due notice of what might occur, and are not of opinion that any reasonable expectation could be entertained of its permanency. Adverting, therefore, to the manner of Mr. *Lee*’s appointment, to his tenure or interest therein, and all other circumstances of the case, my Lords are
pleased

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pleased to determine that Mr. *Lee* is entitled to no compensation for the loss of his office of town clerk of the borough of *Lyme Regis*."

Mr. *Lee*, in *March* 1837, addressed a further memorial to the Lords Commissioners, urging several arguments in support of his claim, and, among others, that, under sect. 66, the right to some compensation was absolute, and the enquiry into the circumstances of any particular case had reference only to amount. The Lords Commissioners replied that they saw no reason to alter their decision.

Manning now referred to sect. 66 of stat. 5 & 6 *W. 4. c. 76*. [*Coleridge J.* Does not the decision, on appeal, rest with the Lords of the Treasury?] It is clear, by sect. 66, that some compensation is to be made at all events. The appeal is only for the purpose of rectifying an improper assessment. Where the town council has refused to assess any compensation, the Lords of the Treasury have no jurisdiction. It is as if the council had made no determination at all.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the nature of the motion, and the refusal of compensation by the town council, his Lordship proceeded. Mr. *Lee* appealed to the Lords of the Treasury, who thought the refusal right; it appearing that Mr. *Lee's* appointment was made on the 31st of *August* 1835, only a little time before the passing of stat. 5 & 6 *W. 4. c. 76*. If any thing called upon us to grant a rule, the compensation could only be of the lowest amount. There could be no real loss, as it must

must have been known that the office would so soon cease. We are not, however, bound to grant a mandamus where it would be merely nominal. We are satisfied that the town council and Lords of the Treasury have done right. I do not enter into the question whether or not we could review what the Lords of the Treasury have done.

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Rule refused.

THOMAS WARRE and Others, Executors of *Monday,*
JAMES WARRE, against CALVERT, Admini- *June 5th.*
strator of LAYCOCK.

DEBT on bond of the intestate *Laycock*, to the testator, *James Warre*, dated 2d of November, 1829, for 5000*l.* Plea, Non est factum. Issue thereon.

The plaintiffs suggested breaches, and set forth the condition of the bond: which was, that *Robert Streater*, his executors, &c., should observe, perform, &c., all and singular the covenants, promises, &c., mentioned

By agreement between plaintiff and S., S. was to perform certain works for plaintiff for a certain sum, and to receive from time to time three-fourths of the cost of the part completed, the first payment

to be made after one-eighth was performed, the remaining fourth part to be paid one month after the whole was completed: if S. should fail to perform the work, plaintiff might employ others to perform it, and deduct the expense from the sum payable to S. Defendant entered into a bond, conditioned for performance of the agreement by S.

S., after performing part of the works, abandoned the contract. Plaintiff, at the request of S., and upon new security given by him, had advanced to S., for assisting him in performing the works, a sum exceeding the whole cost of the works performed at the time of the abandonment, but less than the whole contract price. Plaintiff had the works completed at an expense which, added to the cost of the part performed by S., was less than the whole contract price agreed on with S., but which, added to the sum actually advanced to S., exceeded that contract price.

Plaintiff brought an action of debt on the bond, suggesting, as a breach, S.'s non-performance, and the plaintiff's loss thereby. Defendant pleaded non est factum. Held,

That plaintiff was entitled to nominal damages only, the loss having arisen, not from the non-performance of S.'s contract, but from plaintiff having advanced more than the contract required. Especially as the sum advanced exceeded, not only the three-fourths, but the whole of the work completed; and as the advances had been made on a fresh negotiation with, and security taken from, S.

Held, also, that this answer could not be pleaded by defendant, but was properly set up, under non est factum, to meet plaintiff's evidence of damages.

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and contained in a certain instrument in writing, bearing date 29th *September* 1829, purporting to be an agreement or contract made with the plaintiffs' testator, *Warre*, treasurer of the *London Dock Company*, and on their behalf, by the said *Robert Streater*, which, on the part and behalf of *Streater*, his executors or administrators, were to be observed, &c. The suggestion then set out in part the contract in writing (a), which was stated

(a) The whole contract (as afterwards stated in the special case, see p. 149, post) was as follows; but the parts in brackets were omitted in the suggestion.

"Articles of agreement and contract, entered into this 29th day of *September* 1829, between *Robert Streater*, of " &c. "of the one part, and *James Warre*, Esq., treasurer of the *London Dock Company*, for and on behalf of the said company, of the other part, as follows; that is to say, the said *Robert Streater* doth hereby contract, promise, and agree, to and with the said *James Warre*, as treasurer aforesaid, that he the said *Robert Streater* shall and will execute and perform, in a substantial and workmanlike manner, the whole of the works required in the formation of an entrance from the river at *Shadwell* to the *Eastern London Dock*; that the said works shall be commenced at such period as the directors of the said company shall appoint, they giving the said *Robert Streater* twenty days' previous notice, and the whole be completed within twelve months from such period; the said *Robert Streater* doth further contract, promise, and agree, to provide at his own expense the whole of the materials, labour, engines, tools, implements, and every other matter or thing which may be required in the formation and completion of the said entrance, and also execute the whole of the works as laid down and described in the plans numbered 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, and the specification hereunto annexed, and according to the particulars and conditions of this contract, in consideration of being paid the sum of 52,200*l.*, and also of being allowed to appropriate to his own use the materials of the houses and other premises therein referred to. [Such parts of the materials as shall be approved by the engineer to the said company may be used by the said *Robert Streater* in the works to be performed under this contract; the remainder are to be removed by him, in conformity with the directions which may be given to him by the said engineer. The said engineer to be the sole judge of the said works, and every part thereof, being executed and performed agreeably to the said plans and specification, and to have the power of rejecting at any time any materials or work which

in

stated to be for the performance of certain works by *Streather* for 52,200*l.*, in twelve months from the commencement, with power to the directors of the company to appoint the time when the works were to be commenced, to make alterations on certain terms, and to extend the time.

The suggestion then stated that, after the making of the said instrument and of the bond, viz. 1st *December* 1829, the directors appointed that the works should be commenced on a day then to come, viz. 28th *December* 1829, whereof they gave notice to *Streather*, viz. on &c. : whereupon *Streather* commenced the works in pursuance of the contract. That afterwards, and before the period of twelve months so limited, &c., had expired, and in the lifetime of *Laycock*, viz. on 21st *December* 1830, by a certain memorandum of agreement under

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in his opinion shall not be conformable thereto, and to provide other materials in lieu of those rejected, and employ competent persons to perform the work, if the said *Robert Streather* shall fail so to do, in which case the cost or amount thereof shall be deducted from the sum so to become due and payable to him under this contract.] The said directors are to be at liberty to alter the plans, and thereby add to or diminish any part of the intended works, without prejudice to or making void this contract, in which case a proportionate addition or deduction shall be made to or from the sum to be paid to the said *Robert Streather*, the amount of such addition or deduction to be computed according to the schedule of prices contained in the said specification. [The said *James Warre* doth hereby undertake, promise, and agree, for and on behalf of the said company, to pay to the said *Robert Streather* the said sum of 52,200*l.* by the following instalments, upon the production, in each case, of a certificate signed by the company's engineer; viz. three fourths of the cost of the work certified to have been done every two months; the first instalment to be paid whenever the said engineer shall certify that the portion of the work performed amounts in value to one-eighth part of the whole; the remaining one fourth within one month after the full completion of this contract." Signed by *Robert Streather*. Then followed the specification referred to.]

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seal, between *Streather* of the first part, one *Thomas Warburton* and *Laycock* of the second part, and *James Warre*, for and on behalf of the company, of the third part, after reciting (amongst other things) the giving of the bond, and that *Streather* had, with the concurrence of *Warburton* and *Laycock*, requested of the directors an extension of the term for completing the works, it was declared to be agreed by and between the parties, that *Warre*, on behalf of the company and the directors thereof, did consent and agree that *Streather* should be allowed an additional term of three months, viz. to 28th *March* then next, for the completion of the works: and *Laycock* thereby agreed that the extension of time should not in any respect lessen the security, or prejudice or affect the rights of, the company under the bond, and that *Streather* should complete the whole of the works, so contracted &c., within the said extended term, and that, save and except as to the extension of time thereby granted, such bond should remain and be in full force &c.

The suggestion then stated that the directors, whilst *Streather* was carrying on the said works, did, under the power reserved by the contract, from time to time alter the said plans, and thereby did add to certain parts of the said intended works, and diminish other parts; and it stated that, upon the balance of such additions and diminutions, computed according to the schedule of prices contained in the specification annexed to the contract, a certain sum, viz. 3731*l.* 16*s.* 8*d.*, became and was payable to *Streather* in respect of such additions and diminutions, over and beyond the said contract price of 52,200*l.*: And, although *Streather* was allowed to appropriate, and did in fact appropriate, to his own use the materials

materials &c., in the suggestion in that behalf referred to, and although the directors, whilst *Streather* was so carrying on the works, did advance and pay to him divers sums of money, amounting &c., to wit 48,155*l.* 0*s.* 9*d.*, in respect of the said contract price of 52,200*l.*, and of the said balance of 3731*l.* 16*s.* 8*d.*, and were always ready and willing to advance and pay him the residue thereof respectively, on due performance by him of the said contract or agreement, whereof *Streather* always had notice, nevertheless, for assigning &c., the plaintiffs did further suggest and say that *Streather* did not nor would execute, complete or perform &c. the whole of the said works &c., in the said contract or agreement mentioned &c., within twelve months from the time of commencement appointed by the directors, or within such additional term of three months as aforesaid, or at any other time whatsoever; but, on the contrary thereof, at the expiration of the said additional term of three months, viz. on 28th *March* 1831, the said works were and remained still uncompleted and in great part unperformed and unexecuted by *Streather*, and *Streather* then left and abandoned the said works so unperformed &c., contrary to his said contract &c., and the same remained and continued so unperformed &c., until the company were afterwards, viz. on the day and year aforesaid, and on divers other &c., forced and obliged to cause and procure, and did in fact cause and procure, the same to be performed, executed, and completed by certain other persons on their behalf, viz. as laid down and described in the plans and specification referred to in the suggestion, and according to the particulars and conditions of the contract. And, in and about so causing and procuring the said works to be performed

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&c. as last aforesaid, the company hath necessarily paid, laid out, and expended divers sums, &c., viz. 20,339*l.* 7*s.* 5*d.*, over and beyond the said sum of 48,155*l.* 0*s.* 9*d.*, so as aforesaid paid and advanced to *Streather* whilst he was carrying on the said works; and thereupon and thereby the said company hath, in the whole, been put to a much greater cost and expense in and about the performance &c. of the said works, than the said several sums of 52,200*l.* and 3731*l.* 16*s.* 8*d.*, for which the same ought to have been performed &c. by *Streather*, viz. to the amount of 12,562*l.* 11*s.* 6*d.* over and above those sums: and so the said plaintiffs say that the said company, *by and through the nonperformance and nonfulfilment by the said Robert Streather of the said covenants and agreements matters and things mentioned and contained in the said contract or instrument in writing, to be by him performed and fulfilled*, have sustained loss and damage to a large amount, viz. 12,562*l.* 11*s.* 6*d.*

On the trial before Lord *Denman* C. J., at the *London* sittings after *Hilary* term 1836, it was contended for the defendant that, upon the facts of the case, the plaintiffs were entitled to nominal damages only. The Lord Chief Justice being of that opinion, a verdict was given for 1*s.* damages, his Lordship suggesting, however, that the question as to damages should be brought before the Court by a special case. In *Easter* term 1836, Sir *F. Pollock* obtained a rule nisi for a new trial, with liberty to state a case. A case was afterwards agreed to, in substance as follows.

On the 29th of *September* 1829, *Streather* entered into the contract with the *London Dock Company*, to execute the works.

The case then set out the whole of the contract, as
 ante,

ante, p. 144. note (a). It provided, among other things, that the work should be paid for by instalments, three fourths of the cost of the work certified to have been done every two months; the first instalment to be paid when it should be certified that one eighth, in value, of the whole, had been performed: the last fourth to be paid within one month after full completion of the contract. If *Streather* should fail to perform the work, the company might employ others to do it, and deduct the cost from the sum otherwise payable to him.

On the 2d *November* 1829, *Streather* entered into the bond mentioned in the pleadings, with the defendant and another as his sureties. The directors, pursuant to the terms of the contract, appointed that the works should be commenced on 28th *December* 1829; and the same were commenced accordingly. They should, therefore, by the terms of the contract, have been completed on 28th *December* 1830. *Streather* having, with the concurrence of his sureties, applied for an extension of the time, the directors agreed to allow him an additional term of three months, viz. to 28th *March* 1831; and, accordingly, the memorandum of agreement under seal in the pleadings mentioned was, on 21st *December* 1830, entered into between *Streather* of the first part, the defendant and his co-surety of the second part, and the late treasurer of the *London Dock Company* of the third part (see suggestion of breaches, ante, p. 146.). On the 28th *March* 1831 (when the extended time expired), a considerable part of the works remained unfinished; and *Streather* having become embarrassed in his circumstances, and being unable farther to prosecute the works, his men withdrew on 30th *April* 1831. On the 21st of that month, a

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commission of bankrupt was issued against him; and the works were ultimately completed by the company.

The plans of the works were from time to time altered by the directors, pursuant to the power reserved to them by the contract, the result of which alterations was that 3731*l.* 16*s.* became payable to *Streather* over and beyond the contract price of 52,200*l.*

Between 18th *May* 1830 and 25th *March* 1831 inclusive, *Streather* received from the company advances or payments to the amount of 48,155*l.* 0*s.* 9*d.* The dates and amounts were set forth in the plaintiff's particular of demand.

After *Streather* left the premises, the company completed the works at an expense (ascertained as far as practicable, according to the scale of prices in *Streather's* contract) of 18,875*l.* 3*s.* 2*d.* Some materials were left on the premises when *Streather* quitted them, which the company used in completing the work, and had to pay for: their value was 1209*l.* (a). The case added, that they were obliged to pay a part of this sum to *Streather's* assignees, on the grounds stated in *Crowfoot v. The London Dock Company* (b).

The amount of the work done by *Streather*, at the time when he left the premises, was 36,429*l.* 10*s.*

Sir *F. Pollock* for the plaintiffs. The non-performance of the works by *Streather* has occasioned to the company a loss of more than the 5000*l.* secured by the bond. They have paid 48,155*l.* 0*s.* 9*d.* to *Streather*, and 18,875*l.* 3*s.* 2*d.* in completing the works, besides 1209*l.* for materials

(a) The Plaintiffs contended that this sum was not included in the 18,875*l.* 3*s.* 2*d.*; but the Court were of opinion that it was.

(b) 2 *Cro. & M.* 637. & *C.* 4 *Tyr.* 967.

left;

left; in all 68,239*l.* 3*s.* 11*d.* If *Streather* had performed the contract, the expense would have been only the aggregate of 52,200*l.* and 3731*l.* 16*s.* or 55,931*l.* 16*s.* The defendant contends that the company were not bound to make an advance to that amount, but, on the contrary, had, under the contract, the power of retaining one fourth of the price of the work done; and that, therefore, they cannot recover that sum from him as surety. But that clause was introduced for the protection of the company; and the surety has no right to object to their not availing themselves of it. He guaranteed the performance of the work. If the company had sued the principal, they would have recovered the whole amount of loss simply as damages for the breach of the agreement. Further, this defence, if available at all, is not so at law. And it cannot be given under a plea traversing merely the execution of the bond. *Law v. The East India Company (a)* will be cited for the defendant; but there the defence arose in equity: and, besides, the condition was that the principal should duly account, and it appeared that a balance had been actually paid to him, which was the strongest evidence that he had duly accounted.

Sir *J. Campbell*, Attorney-General, contra. Even if the company had been entitled to insist, as against the defendant, on the payment for all the work performed, they could have shewn no loss; for that payment, added to the 18,875*l.* 3*s.* 2*d.*, falls short of the 55,931*l.* 16*s.* Even against *Streather*, the company, in an action on the contract, could have recovered only nominal da-

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mages. The advances beyond the value of the work performed must have been sued for in another form. Suppose the company had, before any work done, advanced all the 55,931*l.* 16*s.*, could they have recovered this from *Streather* in an action on the contract? They must have sued specifically on the advance. This argument is strengthened by the fact that, as appears from the award set out in *Crowfoot v. The London Dock Company (a)*, the advances were made upon the request of *Streather*, subsequent to the contract and bond, and upon a new security. But the case of the surety is much stronger; for the company were not bound to advance even the 36,429*l.* 10*s.*, but only three fourths of it. What they were not bound to advance under the contract cannot be brought into account against the surety, who guarantees them merely against loss upon the contract. And the contract empowers the company, in case of *Streather's* default, to execute the works themselves, and deduct the expense from the money payable to him; thus contemplating a protection to them by retaining the fourth part of the costs of the works completed. *Law v. The East India Company (b)* turned only on the fact of payment to the principal. As to the point (which was not taken at *Nisi Prius*) that the defence should have been pleaded specially, the facts urged on behalf of the defendant could not be pleaded; for they do not constitute a defence, but merely meet the plaintiffs' evidence of the amount of damage.

Sir *F. Pollock* in reply. If there had been no stipulation at all respecting the time of payment, the surety would have been bound to the full extent of the loss, so

(a) 2 C. & M. 637. S. C. 4 Tyrwh. 967.

(b) 4 Ves. 824.

far

far as the sum named in the bond goes. He guarantees the performance of the contract, and must make good the loss arising from the obligee acting upon the supposition that the contract would be performed. The company are to be placed in the situation in which they would be if *Streather* had performed it. If, as argued on the other side, the company lose the benefit of the guarantee by making any payment not absolutely necessary, the bond is useless: for, while the company make no advance of what they are ultimately to pay, they incur no risk. Then the clause enabling the company, if they please, to withhold payment of one fourth cannot vary the situation of the parties: the question still is, whether the company are to lose the benefit of the bond by having performed more of their part of the contract than they could have been compelled to perform so early. It is a question which might as well be raised in almost every case of principal and surety: but the party who takes the guarantee, if the surety complain of his having omitted something which might have prevented the loss, answers, that he took the security for his additional protection (a). The clause enabling the company to complete the works and deduct the expense of so doing from the sum payable to *Streather* seems to apply merely to the case of *Streather* performing the work ill, not to that of non-performance. If it be true that the remedy against *Streather* for the advances could be only an action for money lent, the plaintiffs must fail: but that is not so; for every advance is made on the contract, and in part performance of it by the company;

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(a) See the judgment of Lord Brougham in *M'Taggart v. Watson*, 1 *Shaw & MacL.* 590. Also *The Trent Navigation Company v. Harley*, 10 *East*, 34.

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and the whole loss could have been proved in an action brought on the contract against *Streather*.

LORD DENMAN C. J. I had no doubt at *Nisi Prius*, and I feel none now. It is perfectly clear that the loss sustained by the company arises, not from the breach of the contract, but from their having volunteered an advance to the contractor. But the surety has undertaken only to be liable for the damages arising from the breach of contract.

LITLEDALE J. I am also of opinion that the verdict must be confined to nominal damages. It appears (to use round numbers) that the work actually performed by *Streather* was of the value of 36,000*l*. The advances, according to the company's contract with him, were to be three fourths of the cost of the work done, that is, 27,000*l*. They however advanced, not only more than this, but 48,000*l*., being 12,000*l*. more than the value of the work done. Then, through *Streather*'s default, they are obliged to get the work finished by others, which costs them 18,000*l*. more. The money therefore which was payable under the contract to *Streather*, by way of instalment, added to the sum afterwards paid for the completion of the work, is less than the sum which, if *Streather* had performed all the contract, they would have had to pay him, namely, 55,000*l*. The advances beyond the 27,000*l*. were not made under the contract. It might perhaps be proper for the company to make advances for the purpose of enabling *Streather* to fulfil his undertaking; but such advances are not made in terms of the contract. A surety has a right to require that the obligee shall do his duty; and I think that ad-
vances

vances made in this manner by the obligee do not render the surety liable. It is contended that the surety is to see to the performance of his principal's contract; and that is true: but how can he watch the advances made by the other party? Here he may, in fact, have known of the advances: but that does not affect the general rule. The company should have advanced only what the contract bound them to advance: in the result, the work was completed at an expense below the contract price. Now the assignment of breaches charges that *Streather* did not perform the contract within the twelve months, nor within the additional term of three months (a), and that, by reason thereof, the company were obliged to procure the works to be completed by others, whereby they were damaged. But they have, in fact, sustained no damage at all by this. Sir *F. Pollock* suggests that the defence should have been pleaded; but it could not; performance might be pleaded, or that the obligee was damnified by his own wrong; but this is not a damnification by the wrong of the obligee, but a damnification not arising on the contract. The ground of my judgment is that the advance has been made, not only beyond the 27,000*l.*, but beyond the 36,000*l.* How far the defendant could be made liable in another form is not now in question.

PATTESON J. This being an action on a bond, the question is, whether, on the breach suggested, any damages are shewn to have been sustained by the non-

(a) The learned Judge here referred to *Brown v. Goodman* (note (b) to *Littler v. Holland*, 3 T. R. 592.), as to the effect of enlarging the time by a distinct instrument; adding, however, that the present case did not raise that point.

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performance of the covenant. Whether the alteration of the time takes the case out of the condition of the bond is immaterial; for the plea denies only the execution of the bond, not the breach. It is clear, therefore, that there has been a breach, and that the plaintiffs must have a verdict: and the question is whether there be any damage. It is asked, what would be the use of the bond, if the company were bound to retain in hand one fourth of the cost of the work performed. The object was, that the company might have some one to whom they might resort in the event of *Streather* failing to perform the contract, and of the works being completed by others at a cost exceeding the contract price. That shews why the penalty of the bond is not larger; it was merely to cover such excess, which was not likely to amount to more than 5000*l*. The argument, therefore, as to the inconsistency of the security with the alleged restriction on the company fails. Then let us look at the contract. *Streather* could call for no money till he had performed one eighth of the work; and, after that, as the work went on, he could call for three fourths only of the cost of the work performed. Any further advances were, no doubt, as Sir *Frederick Pollock* urges, made *on* the contract; but they were not made *under* the contract. Even, therefore, if there were no specific agreement, the surety would not be answerable. His liability is for damages accruing from the breach of contract, not from advances by the company. Still less could he be liable, if the advances were made upon a subsequent negotiation between the company and *Streather*, and a fresh security given by the latter. No damage, therefore, has been sustained.

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WILLIAMS J. The liability which it was intended to impose upon the surety was for the nonperformance of the contract; but the company are not aggrieved by the nonperformance of the contract, since the works have been completed at an expence less than the sum which they would have had to pay to *Streather*. The loss arises from the contract in no sense except that, if there had been no contract at all, there would have been no advance. But the advance is made, not under the contract, but upon the security of *Streather*.

Verdict to stand for nominal damages.

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DOE on the several Demises of ANN LEEMING *Monday,*
and MARY LEEMING, *against* ANN SKIRROW. *June 5th.*

ON the trial of this ejectment before *Parke B.*, at the *Lancashire Spring assizes, 1836*, it appeared that the lessors of the plaintiff claimed under *John Leeming*, the late husband of *Ann Leeming*; that the defendant was the widow of *John Skirrow*; and that, in 1827 (after their marriage), he, being possessed of the premises in question, conveyed them, by lease and release, to *John Leeming* in fee, with covenant to levy a fine to bar the defendant's dower, which fine, however, was not levied. The defendant executed the deed with her husband. She was, at first, unwilling to do so, but consented, on its being agreed, verbally, by *Leeming*, that *John Skirrow* should hold the premises during the joint lives of himself and *Leeming*. *Skirrow* and the defendant re-
ment brought against her by the purchaser's representatives,
Held, that she could not set up against them the title of a party to whom her husband, before the above-mentioned conveyance, had given a mortgage for 1000 years.

S., the husband of *A.*, being in possession of lands, made a conveyance of them in fee; but it was agreed, verbally, between him and the purchaser, that, during the joint lives of the purchaser and *S.*, the possession of *S.* should not be disturbed. The purchaser died; and *S.* received notice to quit. He also died, the notice having expired. *A.*, the widow, retained possession. On eject-

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mained in possession accordingly, paying no rent, till *Leeming's* death, when *Skirrow* received notice to quit. After the expiration of the notice, he also died, leaving the defendant in possession. On the trial, the defendant attempted to set up a mortgage of the premises for 1000 years, made by *John Skirrow*, in 1816, to one *Marshall*; and some evidence was given to shew that *Leeming* was privy to the mortgage. For the plaintiff it was urged that the defendant was estopped from availing herself of the mortgage, as she had come in under her husband, who, by his agreement with *Leeming*, had become *Leeming's* tenant during their joint lives. The learned Judge was of opinion that the mortgage could not be set up by the defendant, who had come in under her husband's title, and had no other: and he directed a verdict for the plaintiff, giving leave to move to enter a nonsuit. *Blackburne*, in the following term, moved accordingly, and cited *Cornish v. Searell (a)*. A rule nisi was granted.

Cresswell now shewed cause. If *Cornish v. Searell (a)* applied, it would shew that *John Skirrow*, if alive, might set up the mortgage against *Leeming's* representatives. But, if the payment of the rent estops the party paying, because it is an acknowledgment of title, à fortiori will a party be estopped who himself gave the title by conveying the property. In *Cornish v. Searell (a)* the defendant had signed an attornment to the parties whose title he afterwards disputed; but, finding that they had no legal estate in the premises, he had refused to pay them rent; and he had never obtained possession under them. The present case is

(a) 8 B. & C. 471.

very

very different. The defendant here cannot even allege any title since the conveyance, except under her husband; he then retained possession by virtue of the agreement with *Leeming*, which possession she has improperly continued after the stipulated time had expired. She could not have been considered a disseisor, according to *Doe dem. Burrell v. Perkins* (a).

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Joseph Addison, contra. *Skirrow* would not have been estopped. *Marshall*, the mortgagee, was the real defendant; his title was prior to that of *Leeming*, and might therefore be properly relied upon by *Skirrow*: *Cornish v. Searell* (b). *Skirrow* did not come into possession under *Leeming*, and would therefore have been at liberty to give evidence which shewed that the right of possession was neither in *Leeming* nor in himself; and this is an answer to the action, the lessor of the plaintiff being bound to shew title in herself, in order to recover. It seems, by the evidence, that *Leeming* was aware of the mortgage. Supposing that *Skirrow* himself would have been estopped, the defendant is a stranger to the matter creating the estoppel. It is said that she came in under her husband; but the original possession was derived from some other party than *Leeming*, and there was no subsequent interest which she could acquire through her husband. The execution of the conveyance, which, it is said, would have estopped the husband, could not have such an effect as to her, although she joined in it; nor, indeed, is this contended on the other side. So, too, the verbal agreement could have no effect in estopping the defendant. There was nothing,

(a) 3 M. & S. 271.

(b) 8 B. & C. 471.

therefore,

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therefore, after *Skirrow's* death, to prevent her from relying on the title of *Marshall*, as prior to that of *Leeming* under the conveyance. The authority of *Doe dem. Burrell v. Perkins (a)* has been doubted.

LORD DENMAN C. J. We have acted upon it lately. It is not possible to say here that the defendant was in, after her husband's death, by an interest which she derived from any one. She held only by permission of those who would have been entitled to turn her husband out. The agreement which he had made he was bound by.

LITTLEDALE, PATTESON, and WILLIAMS Js. concurred.

Rule discharged (b).

(a) 3 M. & S. 271. See note [i] to *Clarke v. Pywell*, 1 Wms. Sessd. 319 d. Also the authorities cited, 2 A. & E. 15. note (b).

(b) See *Doe dem. Parker v. Gregory*, 2 A. & E. 14.

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REYNOLDS *against* BLACKBURN and Others.Tuesday,
June 6th.

ASSUMPSIT against acceptors of two bills of exchange (for 285*l.* and 340*l.*), drawn by *Thomas Tempest*, payable to his order at three months, and indorsed (after a mesne indorsement on each bill) to plaintiff.

Plea: That defendants, on the several days &c., accepted the said bills respectively for the accommodation of *T. T.*, the drawer, and without receiving any value or consideration for the said acceptances or either of them, of which the plaintiff had notice: And that, after the said bills were so indorsed to the plaintiff, and after the same had respectively become due and payable, and before the commencement of this suit, viz. on &c., the said *T. T.*, the said drawer, gave and delivered to the plaintiff, who then accepted from the said drawer, other bills of exchange for divers large sums, in the whole exceeding the amount of the sums specified in the said bills in the declaration mentioned, viz. sums amounting to 700*l.*, and payable on certain days then to come; and it was on that occasion agreed, by and between the said drawer and the plaintiff, that the plaintiff, in consideration of the premises, should forbear to sue him, the said drawer, upon the said bills in the declaration mentioned, or either of them, for a long time, viz. three months, and until default should be made in the payment of the said bills so delivered by the said *T. T.*, the said drawer,

Assumpsit by indorsee against acceptor of a bill of exchange. Plea, that the bill was accepted for accommodation of the drawer; that after the bills were due the drawer gave plaintiff, and plaintiff accepted from him, other bills of exchange, of larger amount, and plaintiff agreed, in consideration thereof, to give the drawer time as to the bills now sued upon, for three months, and until default in payment of the new bills: that the new bills were given and received in payment of the bills now declared upon: and that the agreement was unknown to defendant. Replication, de injuriâ. Demurrer, on the ground that the replication attempted to

put in issue more than one matter of defence.

Held, that the defendant having, upon his own shewing, set up the two matters of defence in his plea, could not take this objection.

Held also, by *Patteson J.*, that the replication of de injuriâ here was not bad as pleaded to a plea partly in denial, for that the plea contained no denial.

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to the plaintiff in payment of the said bills in the declaration mentioned: And the defendants further say that the said bills were so delivered and accepted in payment of the said bills in the said declaration mentioned: and the said agreement was so made by and between the plaintiff and the said *T. T.*, as aforesaid, without the knowledge, privity, or consent of the defendants, or any of them. Verification.

Replication, that defendants of their own wrong, and without the cause by them in the said plea mentioned, did not perform the said promises in the declaration mentioned, in manner and form, &c. Conclusion to the country.

Demurrer, assigning for causes, that the replication is double, and that it puts too many facts in issue; that it does not sufficiently confess and avoid &c.; that it does not distinctly and formally traverse &c.; and that *de injuriâ* is not the proper form of a replication to a plea in an action of *assumpsit*. Joinder in demurrer.

Joseph Addison for the defendants. It cannot be contended, after some late decisions (*a*), that *de injuriâ* is generally an improper replication in *assumpsit*: that ground of demurrer is therefore abandoned. But, although the replication *de injuriâ* is proper where the plea consists wholly of matter of excuse, it is otherwise where the effect of the plea is not strictly excuse, or where it partly excuses and partly denies; *Crisp v. Griffiths* (*b*), *Whittaker v. Mason* (*c*). Here, the plea is not wholly in excuse. And, further, the plea sets up two defences, and the replication professes to answer

(*a*) *Isaac v. Farrar*, 1 *Mee. & W.* 65. *S. C. Tyr. & Gr.* 281. *Griffin v. Yates*, 2 *New Ca.* 579. See *Watson v. Wilks*, 5 *A. & E.* 237.

(*b*) 2 *Cro. M. & R.* 159. *S. C.* 5 *Tyr.* 619. (*c*) 2 *New Ca.* 359.

both.

both. The plea alleges, first, that, after the bills were due, the drawer gave the plaintiff, and the plaintiff accepted from him, bills in payment of those now in question, and allowed him time, as to those, till the new bills should be due and default made in paying them; and, secondly, that the latter bills were delivered and accepted in payment of those declared upon. The plea, therefore, contains more than one defence; the plaintiff does not demur for duplicity, but attempts, by the replication *de injuriâ*, to put the several matters in issue. [*Patteson J.* You attempt to set up a plea which you allege to be bad, because, as you contend, the plaintiff has made a bad replication. If your plea is double, and there is a general replication, you cannot take advantage of the fault of your plea to make the replication bad (*a*).]

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Stephen Serjt., *contrâ*, was not heard.

LORD DENMAN C. J. There is nothing in the point. The replication is at least as good as the plea.

LITLEDALE J. concurred.

PATTESON J. The plea here is not partly in denial; it does not deny the matter of the declaration in any way.

WILLIAMS J. concurred.

Judgment for the plaintiff (*b*).

(*a*) Compare 19 *Vin. Abr.* 38. *Replication and Rejoinder*, (H), pl. 1. in marg., and pl. 3. *Bolton v. Cannon*, 1 *Ventr.* 271. Judgment in *Chitty v. Dendy*, 3 *A. & E.* 323. *Stephen on Pleading*, 306. (4th ed.).

(*b*) See *Solly v. Neish*, 2 *Cro. M. & R.* 355. *S. C.* 5 *Tyr.* 625.

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*Tuesday,
June 6th.**MITCHELL against TOWNLEY.*

To a declaration on indēbitatus assumpsit for four causes of action, with one promise and breach, defendant pleaded, as to 2*l.*, "parcel of the said several sums," payment and acceptance in satisfaction of all the damages by reason of non-performance of the said promises as to the 2*l.*

Held, good, on special demurrer, though the plea did not state to which cause of action the payment applied.

ASSUMPSIT. The declaration stated that, whereas, on &c., defendant was indebted to plaintiff in 50*l.* for goods sold and delivered; in 50*l.* for work done; in 50*l.* for money had and received; and in 50*l.* on an account stated; and, in consideration &c., promised to pay the said several sums of money, yet he had not paid the said several sums, or any &c. Damages 100*l.*

Second plea. As to 2*l.* 10*s.*, parcel of the said several sums of money in the said declaration mentioned, actionem non, because, before the commencement &c., to wit on &c., defendant paid plaintiff 2*l.* 10*s.*, in full satisfaction and discharge of all the damages by plaintiff sustained by reason of the non-performance of the said promises as to the sum of 2*l.* 10*s.*, parcel &c., and that plaintiff then accepted and received the said sum of 2*l.* 10*s.* in full satisfaction and discharge of such damages. Verification.

Demurrer, assigning for causes, that it does not sufficiently appear in respect of what counts or parts of the declaration the plea is pleaded, or whether the sum of money was paid in satisfaction of certain portions of all the several causes of action, or of some only; or, if of some, of what portions; or how, or for what purpose, the same was paid: and that the plea does not sufficiently shew when the money was paid, or whether it was not paid before any of the promises were broken, or even made; and, also, that it is pleaded in respect of the

the damages only, and not in bar of any part of the action.

Joseph Addison for the plaintiff. This demurrer was framed upon the authority of *Mee v. Tomlinson* (a). The correctness of the decision there given on this point is, however, said to have been questioned by *Patteson J.*; *Marshall v. Whiteside* (b). [*Patteson J.* I was dissatisfied with the decision: and I still think it wrong.] The statements of the several causes of action in this declaration are as separate counts, so far as regards pleading; *Jourdain v. Johnson* (c). In *Swinburne v. Ogle* (d) infancy was pleaded to two counts for goods sold and delivered, one being on the quantum valebant, the other on the indebitatus assumpsit. The plaintiff replied, that part of the goods sold were for the fitting and necessary apparel of defendant; and the residue, food necessary and fitting for his sustenance. On demurrer, the replication was held bad for not distinguishing to which promises the several allegations applied. The same principle was established, as to a tender, in two cases cited in the report of *Swinburne v. Ogle* (d), namely, *Thwaite v. Spencer* (e) and *Hirst v. White* (g). In *Kighly v. Bulkly* (h), to a declaration in debt, by assignee of a reversion against an assignee of a term, for 80*l.* rent in arrear, defendant pleaded, as to 20*l.*, nil debet, and, as to the rest, that he had assigned his term: and the plea was held bad on demurrer, for not specifying the year or half year for which the 20*l.* was due. If the

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(a) 4 *A. & E.* 262.

(b) 1 *M. & W.* 191. *S. C. Tyrwh. & Gr.* 491.

(c) 2 *C. M. & R.* 564. *S. C. 5 Tyrwh.* 524.

(d) 1 *Lutw.* 239.

(e) 1 *Lutw.* 241.

(g) 1 *Lutw.* 242.

(h) 1 *Sid.* 338.

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money be paid without express appropriation, the plaintiff cannot know to which claim it is to be applied; and he cannot reply, or prepare his proof. [*Patteson J.* If the debtor has not made the appropriation, the creditor may.] Also, the plea is ill for not shewing whether the payment was before or after the promise.

Humfrey contra. As to the last point, the payment must be referred to the promise which the plea admits; as to the other point, *Mee v. Tomlinson* (a) is no longer considered law. (He was then stopped by the Court.)

Lord DENMAN C. J. The plaintiff had better amend: and he may do so without paying costs; since, although *Mee v. Tomlinson* (a) is clearly a wrong decision, it has not yet been over-ruled in this Court, where it was pronounced.

LITTLEDALE, PATTESON, and WILLIAMS Js. concurred.

Leave to amend, without costs (b).

(a) 4 A. & E. 262.

(b) See *Noel v. Davis*, 4 M. & W. 136.

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ELIZABETH SMITH *against* EGGINTON, Esquire. *Tuesday, June 6th.*

TRESPASS for assaulting plaintiff, and falsely imprisoning and detaining her, &c.

Pleas, 1. Not guilty. 2. As to assaulting, imprisoning, and detaining, for the period in this plea mentioned, part of the term in the declaration mentioned, that, before the time when &c., to wit 13th *December* 5 *W. 4.*, there issued out of the Court of our Lord the now King, of his Chancery, &c., a certain writ of our said Lord the King of attachment, directed to the sheriff of the town and county of the town of *Kingston-upon-Hull*, commanding the sheriff to attach the plaintiff, and one *Joseph Dudding*, so as to have them before our said Lord the King in his said Court of Chancery, on the 8th of *January* then next, wheresoever the said Court &c., to answer to our said Lord the King, as well touching a contempt which the plaintiff and *J. D.*, as it was alleged, had committed against our said Lord the King, as also such other matters as should be then and there laid to their charge, and further to perform and abide

Stat. 11 *G. 4.*
& 1 *W. 4.*
c. 36. s. 15.
rule 5. provides that, if a defendant in Chancery, in actual custody under process of contempt for not appearing or not answering, shall not be sooner brought to the bar of the Court to answer his contempt, the plaintiff in Chancery, if the contempt be not sooner cleared, shall bring the defendant to the bar &c., in thirty days from his being actually in custody or detained on such process; and, if the last of such thirty days be out of term, then in the first four days of

the ensuing term; otherwise the sheriff, &c., shall discharge defendant out of custody.

In trespass for false imprisonment, defendant, a sheriff, justified under a writ in Chancery, by which he as sheriff was commanded to attach plaintiff to answer "as well touching a contempt" (not stating in what), as such other matters as &c. Replication, that the writ was for a contempt in not answering; that plaintiff was in actual custody of defendant for thirty days under the writ, and was not brought to the bar of the Court in that time, nor was her contempt cleared, the last of the thirty days being in term; and that the plaintiff in Chancery did not bring plaintiff to the bar in the thirty days, though the contempt was not sooner cleared; and that it thereupon became defendant's duty, and he was requested, to discharge plaintiff, but refused.

On demurrer, Held (assuming the defendant to have been bound to discharge the plaintiff without any order of Court): 1. That the action should have been in case. 2. That, even if the defendant had been a trespasser, he was not a trespasser *ab initio*, and the replication should have new assigned.

Semble, that no action lay, for want of notice to the defendant of the facts bringing the case within the rule.

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&c.

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&c. The plea then alleged delivery of the writ, to wit on 18th *December* 1834, to the defendant, who was then, and until and at and after the return of the writ, and until and at and after the time of the discharge hereinafter mentioned, sheriff of the said town &c., to be executed, &c.; that defendant, by virtue of the writ, to wit on 18th *December* 1834, within his bailiwick, took and arrested the plaintiff, and carried and conveyed her to the gaol of the town &c. of *K. upon H.*, the same being the gaol of the defendant as such sheriff, and the fit and proper place of confinement for her whilst in the custody of the defendant, &c.; that the defendant, not having received any writ of habeas corpus, or other writ, order, or direction, to bring the plaintiff from the said prison to the bar of, or into, the High Court of Chancery, and not having received any order or direction from the said Court, or other competent authority, to discharge the plaintiff, until the receipt of the order hereinafter mentioned, kept and detained her, &c., from the time of his so carrying and conveying her to prison, until 30th *March* 1835, when a certain order (made 30th *March* 5 *W. 4.*, by Sir *Launcelot Shadwell*, Knight, then being Vice-Chancellor, &c., in a cause then depending in the said Court of Chancery, wherein *Richard Dudding* and *John Dudding* were plaintiffs, and the said *Elizabeth*, plaintiff in this suit, and others, were defendants, being the cause or suit in which the writ of attachment was issued), whereby it was ordered that the plaintiff in this suit should be discharged out of the custody of the defendant in this suit as to the contempt for which the said writ of attachment was issued, was duly shewn and presented to him, the defendant in this suit; and thereupon the defendant forth-

with

with released and discharged the plaintiff &c. Averment, that the said arrest and imprisonment, and keeping of the plaintiff in this suit, and detaining her in prison for the said space of time in this plea mentioned, were, and each of them was, lawful for the cause aforesaid, and were and are the same supposed trespasses, &c.

Replication. That true it is &c. (admitting the issuing of the writ, arrest, and carrying to gaol, as in the plea). Nevertheless, the plaintiff saith that the said writ issued against the plaintiff for a contempt (*a*) in not answering a certain bill before then filed in the said High Court of Chancery against the plaintiff (and others) at the suit of the said *Richard Dudding* and *John Dudding* in the said plea mentioned; and that the plaintiff, being under such process of contempt for not answering, was in actual custody of the defendant in the said gaol for the space of thirty days under the said writ, to wit from the said 18th *December* 1834 until and upon 17th *January*

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(*a*) Stat. 11 *G.* 4. & 1 *W.* 4. c. 36. s. 15. enacts, "That the rules and regulations hereinafter provided and contained shall be adopted by the High Court of Chancery, and shall from henceforth become orders and rules of the said Court of Chancery, and be observed and enforced in and by the said Court."

The section then sets forth twenty rules. The fifth is as follows.

"That if the defendant, under process of contempt for not appearing or not answering, be in actual custody, and shall not have been sooner brought to the bar of the Court under process to answer his contempt, the plaintiff, if the contempt be not sooner cleared, shall bring the defendant by an habeas corpus to the bar of the Court within thirty days from the time of his being actually in custody, or detained (being already in custody) upon process of contempt, and if the last day of such thirty days shall happen out of term, then within the four first days of the ensuing term;" "and in case any such defendant shall not be brought to the bar of the Court within the respective times aforesaid, the sheriff, gaoler or keeper," &c., "in whose custody he shall be, shall thereupon discharge him out of custody without payment by him of the costs of contempt, which shall be payable by the party on whose behalf the process issued."

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1835; and the plaintiff was not, during all that time, brought to the bar of the said High Court of Chancery under process to answer her contempt, nor was her contempt, during or at the expiration of that time, or at any other time, cleared: that the last of the said thirty days during which the plaintiff was in actual custody under the said process of contempt as aforesaid, to wit the said 17th *January* 1835, happened in term, to wit in *Hilary* term in the year last aforesaid; and that the said *J. D.* and *R. D.*, the plaintiffs in the said suit, did not, nor did either of them, nor did any other person (although the contempt of the plaintiff was not sooner cleared), bring the plaintiff by an habeas corpus to the bar of the said Court of Chancery within thirty &c., but wholly omitted and neglected so to do; by reason whereof it became, and then was, the duty of the defendant, so being sheriff, and having the plaintiff in his custody as aforesaid, to have thereupon discharged the plaintiff out of custody under the said process of contempt; and, although plaintiff afterwards, and after the expiration of the said thirty days, to wit on 18th *January* 1835, and often afterwards, requested defendant to discharge her &c., yet defendant, not regarding the statute in such case &c., did not nor would, at the expiration of the said thirty days, and when he was requested as aforesaid, discharge plaintiff out of his custody under the said process of contempt, but wholly refused &c., and, on the contrary thereof, wrongfully and against the will of the plaintiff, and contrary to the form of the statute in such case &c., imprisoned &c., and detained &c., in manner and form as in the declaration &c.

Demurrer, assigning for causes, that the replication does not shew any order made by competent authority
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for plaintiff's discharge in the interval between the arrest and the discharge under the order mentioned in the plea, but assumes that defendant was bound to discharge the plaintiff *ex officio*; and also that plaintiff has not traversed or denied any of the matters in the plea, which form a complete justification of the imprisonment and detention, &c.; and that the replication is pleaded, not by way of new assignment, but in bar. Joinder.

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R. V. Richards for the defendant. The plaintiff relies upon stat. 11 G. 4. and 1 W. 4. c. 36. s. 15. rule 5. But, first, the sheriff was not bound to act of himself in discharging the plaintiff. The record simply shews the fact that thirty days expired without the plaintiff having been brought up. The rule, indeed, says that the sheriff "shall thereupon discharge him out of custody." But this means that a party entitled to be discharged shall have the right to apply to the Court, who shall then make the proper order; as, at law, where a prisoner on mesne process is discharged for want of a declaration. The liability, if any, rests upon the party at whose instance the attachment issues, as in the case of a plaintiff not discharging defendant from a ca. sa. on tender of payment; *Crozer v. Pilling* (a). Secondly, the plea should have alleged notice to the sheriff of the nature of the contempt, and of the facts entitling the party to her discharge. The sheriff has no means of knowledge beyond the writ; and the writ shews merely the fact of the process being for some sort of contempt. If, without such notice, the sheriff is liable to an action, he might be held so under any circumstances entitling the defendant

(a) 4 B. & C. 26.

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to be discharged, as, for instance, an arrangement between the parties not known to the sheriff. Thirdly, supposing the sheriff liable under the circumstances, the action should be in case, not trespass. The rule requires the sheriff to discharge the prisoner: the complaint therefore is of a non-feasance. The record shews that the commencement of the imprisonment was lawful. At all events, till the process is set aside, the sheriff can be charged with neglect only. An act of omission cannot make a party a trespasser *ab initio*; *Six Carpenters' Case* (a). Indeed, on the authority of that case, it may be questioned whether the defendant, here, could be a trespasser *ab initio* by any act; for he acted, not strictly under general licence given by law, but under the express order of the Court of Chancery. If the sheriff do not, under stat. 23 H. 6. c. 10. s. 1. (5), let a prisoner on mesne process out of custody upon reasonable sureties being offered, the remedy is case, not trespass; there the words are, that the sheriff "shall let out of prison," which resemble those of the rule now under discussion. So, under stat. 8 Ann c. 14. s. 1., if the sheriff take goods in execution without paying the year's rent to the landlord, though the words are that "no goods," &c., "shall be liable to be taken by virtue of any execution," the remedy is in case. So, if a prisoner be not discharged on a ca. sa. upon paying the debt, the action is in case; *Crozer v. Pilling* (b). [Lord Denman C. J. That was not against the sheriff, but the suitor, who was, I think, hardly used.] The sheriff is, at any rate, not less protected than the party. The language of the

(a) 8 Rep. 146 a.

(b) 4 B. & C. 26.

Court in *Gates v. Bayley* (a) shews that trespass is not the proper remedy here. *Winterbourne v. Morgan* (b) is distinguishable: there the defendants had entered under a warrant of distress, and remained an unreasonable time, and it was held that they were liable in trespass: but there was an actual misfeasance, by acts done on the premises, during the time when the continuance had become unlawful. But, even if the defendant could be treated as a trespasser ab initio, the replication should be in the nature of a new assignment, which here it is not.

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Hurlstone, contra. The replication brings the case within the language of the fifth rule, which expressly lays upon the sheriff the duty of discharging the prisoner under circumstances like those stated. The replication alleges a request to discharge, and refusal. That is a misfeasance; and therefore the confinement from thenceforward is a substantive trespass. The fifth rule mentions no order of Court, though, where an order is necessary, it is expressly required, as in sect. 13, and rules 2, 7, 13, 15, 16, 17, 18, &c. The intention of the act was to relieve from imprisonment. A party was not in the custody of the Court till he was within the walls of the *Fleet* prison. The object is, therefore, to bring the prisoner within the *Fleet*, and then the Court applies the relief according to the machinery of the act. This particularly appears by comparing rules 5 and 13. If the prisoner is not brought to the bar of the Court to answer his contempt in due time, by

(a) 2 *Wils.* 313.

(b) 11 *East*, 395. See Lord *Ellenborough's* remarks at pp. 400, 401, 403.

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rule 5 the sheriff is to discharge him without payment of costs, which are to be paid by the party on whose behalf the process issued. But, by rule 13, after the defendant is in contempt for not answering, an answer may be put in for him, and then the Court adjudges upon the costs at the time of ordering the discharge. It is reasonable that the defendant, having put the opposite party to this expense, should make the application. As it may not be in the power of a prisoner, from poverty or other circumstances, to bring himself into the situation in which the Court acts, the 5th rule requires that he be brought up, which will place him in such a situation, or else that, after a certain time, he be discharged without payment of costs. The object of the act is defeated, if it be held that the prisoner must, in that case, take the step in order to be relieved. In a case in the Vice-Chancellor's Court, on the first day of this term, *In re Dunn*, a prisoner was brought up to be transferred to the *Fleet*; but his Honor said that he was entitled to be discharged, the time having expired; and, on counsel requesting an order for that purpose, the Vice-Chancellor said that an order was unnecessary; and that the sheriff, if he detained the prisoner, would be liable to an action. An illegal detention subjects the wrongdoer to an action as much as an illegal arrest; 2 *Inst.* 53. As to the want of notice, the sheriff is bound to take notice of the nature of the proceedings; besides, it appears from the replication that the case falls within the rule. [*Littledale J.* But not that the sheriff had notice of the facts bringing it within the rule.] If a new assignment be requisite, this replication is, in fact, in the nature of a new assignment, for it alleges an abuse. There could not be a formal new assignment, because the plea covers the
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the whole time; and there is no distinct act which could be new assigned. The authorities on this point are collected in note (6) to *Greene v. Jones* (a). [Lord Denman C. J. mentioned *Salmon v. Percivall* (b).] There the defendant, to a declaration for false imprisonment, pleaded that he was serjeant of the mace in *London*, and arrested the plaintiff, under the custom of *London*, till he should find bail; and the plaintiff replied that he tendered sufficient bail, but that the defendant, notwithstanding this, detained him; and it was held, on motion in arrest of judgment, that, even if the defendant could have accepted bail, his refusal "doth not make the arrest and imprisonment tortious, to have trespass; but he might upon the matter have had an action upon the case for detaining him in prison after bail tendered." But that was a mere breach of duty; the process was still in force; here it is as if it had never issued. [*Patteson* J. I do not see any difference between the two cases in that respect.]

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R. V. Richards, in reply. The words of the rule cannot be taken strictly, but must have an equitable construction. The sheriff, on a strict construction, would be bound to discharge a party, under the circumstances mentioned in the rule, though there were other detainers against him. The replication is said to be in the nature of a new assignment: but it proposes to avoid the whole plea. As to the form of action, *Salmon v. Percivall* (b) has not been distinguished. The points arising here upon the pleadings could not come before the Vice-Chancellor in *In re Dunn* (c).

(a) 1 *Wms. Saund.* 299 a. (b) *Cro. Car.* 196. (c) *Antè*, p. 174.

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LORD DENMAN C. J. It appears to me that this action cannot be maintained. If it lay at all, it should have been brought in case; *Salmon v. Percivall* (a) is in point. Wherever the law consigns a party to the custody of another, that person is entitled to have full notice that the custody is at an end. No such notice appears here, but only a request to discharge, which might, for aught the defendant knew, be premature.

LITLEDALE J. The replication is improper. It does not limit the complaint to the detainer after the expiration of the proper time: it ought to be a new assignment. The general rule is in the *Six Carpenters' Case* (b). Where there is an authority given by law for doing an act, there an abuse may turn the act into a trespass ab initio. But that rule does not apply here. The rule is said to rest upon this;—that the subsequent illegality shews the party to have contemplated an illegality all along, so that the whole becomes a trespass. But here the sheriff could not, from the first, have had in view the detention of the plaintiff after the time should have expired. The action therefore being founded on the original detention, should have been in case. Further, the record does not shew that the sheriff had notice of the nature of the contempt; and there are other contempts besides these mentioned in the fifth rule. There can be no action against the sheriff without such notice. At all events, the form should be case.

PATTESON J. The declaration is in the general form for assault and false imprisonment: it does not state that the plaintiff being properly taken, was improperly de-

(a) *Cro. Car.* 196.(b) 8 *Rep.* 146 a.

tained.

tained. Then, after a plea of the process, what is the replication? Not that the plaintiff's action is not brought for the act justified in the plea, but that the defendant detained the plaintiff too long. The purpose of this is to shew that the defendant is a trespasser ab initio. But he clearly is not so. I should say he was not a trespasser; clearly he is not so ab initio. And I doubt very much whether the present action will lie at all; for the rule applies to only two species of contempts. How is the sheriff to know what the contempt is? The writ does not shew it. The party, therefore, who seeks to be discharged, should inform the sheriff of the facts; but no such notice appears here. It is not necessary, however, to decide this point.

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WILLIAMS J. concurred.

Judgment for the defendant.

WILLIAMS *against* BYRNE.

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ASSUMPSIT. The first count of the declaration stated that, whereas heretofore, to wit 20th May 1833, in consideration that plaintiff, at defendant's request, as reporter to a newspaper, for a given salary, for one whole year, from 20th May, and so from year to year, to the end of each year commenced while the plaintiff should be so employed, reckoning each year to commence from 20th May, for so long as plaintiff and defendant should respectively please: breach, that, after plaintiff had continued in the employment two years and part of a third, defendant would not continue plaintiff in the employment to the end of the third year, but discharged him.

Declaration stated that defendant promised plaintiff to employ him, as reporter to

Plea, that defendant offered to pay plaintiff a sum of money larger than plaintiff would have been entitled to if a reasonable notice of determining the agreement had been given, and required plaintiff to quit immediately, and at the same time gave him a reasonable notice of defendant's intention, in case the tender was refused, to put an end to the agreement, to wit at the end of three weeks from 3d October instant; that plaintiff refused to accept and quit, whereupon defendant discharged him at the expiration of the notice; and that defendant was still ready to pay the sum tendered. On demurrer,

Held, that the contract alleged in the declaration and confessed in the plea, was determinable only by notice ending with a current year; and, therefore, that the plea was no answer.

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quest, would enter into his employ in the capacity of a reporter of the proceedings in the House of Commons and House of Lords, and would furnish reports of such proceedings, and other articles, to defendant, for publication in a newspaper of the defendant, called the "*Morning Post*," for one whole year from a certain day, to wit from the day and year aforesaid, and so from year to year to the end of each year commenced whilst the plaintiff should be so employed by the defendant, and reckoning each year to commence from a certain day, to wit the 20th of *May* therein, for so long as the plaintiff and defendant should respectively please, at and for a certain salary or wages, to wit at the rate of 5*l.* 5*s.* per week for and during each session of parliament, and at the rate, to wit, of 2*l.* 12*s.* 6*d.* per week for and during the remainder of the year, defendant undertook &c. to employ plaintiff in the capacity aforesaid, at and for the salary or wages aforesaid, and to continue him in such employ for one whole year from a certain day, to wit &c., and so from year to year, &c. (following the consideration to the words "should respectively please"); and, although plaintiff, confiding &c., did afterwards, to wit on the day and year first aforesaid, enter into the employ of defendant in the capacity aforesaid, and on the terms aforesaid, and continued in the employ of defendant in the capacity &c., and did furnish reports &c. to defendant for the purpose &c., for a long space of time, to wit two years then next following and also for part of another year after that time, to wit until 24th *October* 1835; and although plaintiff was, on the day and year last aforesaid, and hath always been, ready and willing, and then offered, to continue in the defendant's employ, in the capacity &c.,

&c., and on the terms &c., and to furnish &c. for the remainder of the last-mentioned year so commenced as aforesaid, yet defendant did not nor would continue plaintiff in defendant's said employ till the expiration of the last-mentioned year; but, on the contrary, during the said last-mentioned year, and before the expiration thereof, to wit on &c., refused to suffer plaintiff to continue in defendant's said employ, and wrongfully discharged him therefrom, without any reasonable or probable cause whatsoever, and hath thence hitherto wholly neglected and refused to retain or continue plaintiff in his employ for the remainder of the last-mentioned year so commenced as aforesaid.

Fourth plea to the first count. That, after the making of the said promise, and before the said discharge of plaintiff, to wit 5th *October* 1835, defendant, being desirous to determine and put an end to the said agreement and defendant's said employ of plaintiff in the said capacity, tendered and offered to pay plaintiff a large sum of money, to wit 18*l.* 10*s.*, as and for and in the name of salary and wages, the same being more than the amount of salary or wages which the plaintiff would be and have been entitled to if a reasonable and usual notice of determining the said agreement and employ of plaintiff had been given to him by defendant, and required plaintiff immediately to quit his, defendant's, said employ. Averment, that defendant did, at the same time, give plaintiff a reasonable and usual notice of his, defendant's, intention, in case of the said tender and requisition so made by defendant being refused by plaintiff, to determine and put an end to the said agreement and the said employ of plaintiff, to wit at the end of three weeks from 3d *October* then in-

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stant; that plaintiff refused to accept the said 18*l.* 10*s.*, or any part thereof, or to quit the said employ; wherefore, at the expiration of the said notice, being the said time when &c., defendant discharged plaintiff, &c., and hath from thence hitherto refused, and still doth refuse, to employ plaintiff &c., as he lawfully &c. Averment, that defendant hath always, from the time of his tendering the 18*l.* 10*s.*, hitherto been, and still is, ready and willing to pay plaintiff the said 18*l.* 10*s.* if he will accept the same for the cause aforesaid; whereof the plaintiff hath always hitherto had notice. Verification.

Demurrer, assigning for causes that the plea neither traverses, nor confesses and avoids, the cause of action in the first count; for that, by the agreement as therein stated, defendant had no power to put an end to the agreement before the end of the year commenced, nor to discharge the defendant for the causes alleged in the plea. Joinder.

W. H. Watson for the plaintiff. The declaration shews an express contract for a year, and so on from year to year, without any stipulation as to the method of determining it. In *Beeston v. Collyer* (a), where a yearly hiring of a clerk was implied, it was held that the employer could not turn off the clerk in the middle of a year, and that there must be reasonable notice; and the case was distinguished from that of a menial servant. The notice to determine a contract from year to year must fix the determination at the end of a current year. In all cases except that of a menial servant, the *primâ facie* presumption is that the hiring is for a year;

(a) 4 *Bing.* 309.

Fawcett v. Cash (a). Upon any construction of this contract, as stated on the record, there is no power to determine it by such a notice as that pleaded. The plea, as now framed, does not confess the contract in the declaration, but relies upon a supposed qualification of it, which is not on the record. (He was then stopped by the Court.)

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Mansel contra. Every contract of hiring must be understood to be determinable upon reasonable notice. The contract in the declaration is not traversed; and, therefore, according to the present rules of pleading, it is confessed. In *Beeston v. Collyer* (b) the question of notice was not raised: but *Burrough J.* said, "Unless reasonable notice be given, or ground for dismissal assigned, the defendant was bound to go on to the end of the year." It would be hard on both parties to interpret the contract without this qualification. In *Fawcett v. Cash* (a) *Taunton J.* expressly confined his judgment to the case of a dismissal during the first year. [*Littledale J.* You are setting up a contract different from that in the declaration.] The contract in the declaration implies a power to determine on reasonable notice. It is only from year to year to the end of each year commenced "while the plaintiff should be so employed." In the case of a tenancy from year to year the contract specifies no notice, nor is it pleaded as a contract subjected to determination by notice; yet the law imports the power so to determine. The notice in the case of a menial servant takes effect upon

(a) 5 B. & Ad. 904. And see *Turner v. Robinson*, 5 B. & Ad. 789.

(b) 4 Bing. 309.

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the same principle. What is a reasonable notice, is, in each case, a question for the jury.

LORD DENMAN C. J. I have no doubt upon the case. The plaintiff states the contract to be for one year from *May* 20th, and so on from year to year, to the end of each year commenced while the plaintiff should be so employed, reckoning each year to commence at the day named. This contract the defendant does not deny; but he answers that, in the third year of the employment, he tendered a sum amounting to what would have been payable if a reasonable notice had been given, and gave a reasonable and usual notice that, if the tender was not accepted, he should discharge the plaintiff. What is there to shew that any part of the contract enabled him to do this? If he meant to contend that he had the right to do it, he should have denied the contract set out in the declaration; then the jury would have determined, on the evidence, what the contract was. That must, I take it for granted, have been the question in every case which has occurred: though, in some instances, the nature of the contract is, in fact, so well understood that it is often put as a matter of law. Still it is always a matter of fact, and, being so, should be here stated on the record.

LITLEDALE J. It appears not to be disputed that the parties were, at any rate, bound to the end of the first year. I think their position was the same in all the subsequent years. Therefore, when any year had commenced, the service was to run on to the end. And this was to continue as long as the parties pleased, that is, till one of them determined the engagement by reasonable notice expiring at the end of the current year.
And

And that is the case in other contracts ; as, for instance, in the hiring of houses, the understood custom in some cases requiring more notice, in others less, before the end of the current year. It is not necessary to decide, whether, if the hiring were subject to be determined by notice at any period, that must be shewn by a special plea, or could be proved under non assumpsit. The plea speaks of a reasonable and usual notice. But we cannot say that a notice is reasonable which determines the service before the end of the current year. The case of a menial servant is put in illustration : but, even there, I do not know that we could, as matter of law, imply the power to determine the service at any time on a month's notice. It should be on the record ; and then, on a traverse, the jury would no doubt so find it. The plea, in this case, as it stands, is no answer to the declaration.

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PATTESON J. The only question is, What is the legal construction of the contract which the declaration states, and which the plea does not deny ? It is argued that the jury are to say what is a reasonable notice. That might be so, if the contract were stated to be determinable on a reasonable notice. But the contract stated in the declaration, and confessed by the plea, is not so. It is an employment for a year, and so on from year to year, the year beginning on a day named. The words, " while the plaintiff should be so employed," are satisfied by a power to put an end to the employment in the way warranted in the contract ; that is, if it be put an end to adversely and not by agreement, by a notice expiring with the current year. How long such notice must be, we need not now determine.

1837. **WILLIAMS J.** The case is precisely the same as if this had occurred during the first year; for the contract puts each successive year on the same footing as the first. The notice, therefore, should have terminated with the end of the current year. No delinquency on the part of the plaintiff is suggested; but it is attempted to introduce a new term into the contract.

Judgment for the plaintiff.

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REGULA GENERALIS.

In the King's Bench.

Trinity term, 1837.

*Wednesday,
June 7th.*

IT IS ORDERED, That, from and after the last day of this term, all the offices (the Rule Office excepted) be open in term time from eleven in the forenoon till five in the afternoon, and not in the evening,

And that the Rule Office be open in term time from eleven in the forenoon till three in the afternoon, and from six till eight in the evening.

And that all the offices be open in vacation from eleven in the forenoon till three in the afternoon, except between the 10th day of *August* and the 24th day of *October*, when they shall be open from eleven in the forenoon till two in the afternoon only.

DENMAN.

J. LITTLEDALE.

J. PATTESON.

J. WILLIAMS.

J. T. COLERIDGE.

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CLAY *against* STEPHENSON and Others.Thursday,
June 8th.

ASSUMPSIT for money had and received, for interest, and upon an account stated. Plea, Non assumpsit. On the trial before Lord Denman C. J., at the York Spring assizes, 1836, the Plaintiff produced, in support of his case, certain interrogatories and answers. It appeared that they had been taken under a commission issued from this Court (a), directed to the Court of Commerce at *Hamburgh*; and the commission contained the following directions, among others: — “That you do take such their examinations, and reduce them to writing on paper or parchment; and, when you shall have so taken them, you are to send the same without delay to our said Court before us at *Westminster*, closed up under the seal of the Chamber of Commerce at *Hamburgh*, or under the seals of any two or more of you distinctly and plainly set together, with the said interrogatories and this writ, to be filed of record in the office of *Charles Short*, Esq., the clerk of the rules of the same Court.” The examinations tendered in evidence at the trial had been transmitted in an envelope sealed with the seal of the Court of Commerce; and the same seal was set to the

A commission to examine witnesses was directed to the Court of Commerce at *Hamburgh*; and it was ordered by the commission that the examinations should be taken, and that the same should be sent to the Court of King’s Bench to be filed of record in the office of the clerk of the rules. The Court of Commerce took the examinations by an act of their own; copies of the minutes of that act, certified by their assistant actuary (whom they had added to the commission for the purpose of keeping the minutes), were transmitted under the seal of the Court of Commerce, with the commission; and that Court certified, by indorsement on the execution thereof, by referring to the annexed extract of their minutes. Held, that these copies could not be read in evidence, the commission requiring that the examinations actually taken should be transmitted.

[The order for issuing the commission was drawn up under a mistake; the intention of this Court having been to direct the commission, not to the Court, but to the individuals composing it.]

(a) For the form of the order directing the commission, and the argument upon its being made, see *Clay v. Stephenson*, 3 A. & E. 807.

examinations.

1837. examinations. The document commenced as follows : — (a).
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 against
 STEPHENSON.

“ *Hamburg.*

“ Court of Commerce.

“ This is an extract of the minutes (b) to which the certificate indorsed on the commission refers.

“ (Signed) *D. F. Worlee, Assistant Actuary.*”

“ On this day, *Wednesday* the 15th *July* 1835, before Messieurs *Georg Gottlieb Friedrich Schmidt*, and *David Friedrich Weber*, members of the Court of Commerce at *Hamburg* (who, by an order of the said Court, dated 11th *July* 1835, granted at the request of Dr. *M. Pohls*, on behalf of *Richard Clay*, the younger, of *Goole*, were appointed as commissioners, whilst, by the same order of the Court, *Daniel Friedrich Worlee*, the assistant actuary, one of the sworn officers of the Court, was added to the commission for the purpose of keeping the minutes), after proper summons appeared” &c. Then followed the name, addition, &c. of the witness (*Johann Martin Precht*), the entry of the administration of the oath to him, and his answers to the interrogatories; and, at the close of his evidence, the following words were added : —

(a) The original, in *German*, was produced at the trial, with a translation. It appeared that the depositions had been taken in *German*, and so sent over; that the translation was made in *England*, and oral evidence was given at the trial of the correctness of the translation, by the translators. A question arose, both at Nisi Prius and in bank, whether such a translation was admissible under the precise terms of the commission, which directed that the translators should be sworn to interpret, transcribe, and engross faithfully, so far forth as they should be directed by the commissioners to interpret or engross the depositions; but the Court did not decide this question. *Atkins v. Palmer*, 4 B. & Ald. 377, was cited as to this point as well as the point in the text.

(b) “ *Protocoll-extract.*” Some question arose, both at Nisi Prius and in bank, whether “minutes” was the correct translation.

“ Where-

"Whereupon the witness, after perusal and approbation, signed this declaration; and, after being enjoined to secrecy, he was dismissed.

"(Signed on the minutes.)" "*John Martin Precht.*"

"Whereby this minute was closed for to-day, and signed by the commissioners and assistant actuary.

"(Signed on the minutes.)" "*Georg Gottlieb Friedk. Schmidt*, Judge of the Court of Commerce. *David Friedrich Weber*, Judge of the Court of Commerce. *D. F. Worlee*, Assistant Actuary."

The depositions of *Langnese* were sent in the same way.

At the end of the whole was the following:—

"Whereby this act was closed and signed by the commissioners and the assistant actuary. (Signed on the minutes.)" [Names as before.] "The correctness of this act, and that the same entirely agrees with the original minutes, is hereby attested. (Signed.) (L.S.) *D. F. Worlee*, Assistant Actuary."

The following certificate was indorsed on the back of the original commission, which was returned with the above document, the whole inclosed in an envelope under the seal of the Court:—

"The Court of Commerce of the Free and Hanseatic town of *Hamburg* certifies the execution of the herein demanded examination of the witnesses *Langnese* and *Precht*, by referring to the extract of the minutes annexed herewith.—*D. F. Worlee*, Actuary Assistant."

The defendants' counsel objected that this was only a copy, and could not be received as taken under the commission. Several other objections were made to the

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the admission of the document. The Lord Chief Justice received the evidence, giving leave to the defendants to move on all the objections. Verdict for the plaintiff. In *Easter* term 1836, *Wightman* obtained a rule nisi for a new trial or nonsuit, on the objection above mentioned, and others, which were also discussed on the argument in bank, but were not decided upon by the Court. In this term (a),

Cresswell, Alexander, and Cleasby shewed cause. The document is under the seal of the foreign court, as required by the commission, which agrees with the order of this Court. [*Patteson* J. The order was drawn up in terms quite contrary to our intention. We meant the commission to be addressed to the individuals who happened to be members of the Court of Commerce, not to the Court itself; and this was the express understanding upon which the argument and decision proceeded. I mention this as a caution for the future.] The indorsement on the commission shews that it was duly followed. It is true that this is not the original record of the Court of Commerce: that, of course, could not be produced. But it is a copy certified by their officer; and no complaint was made of any want of proof as to the correctness of the copy: in fact, had such an objection been taken, evidence was ready to shew the correctness. It is not reasonable to interpret the commission into an order to the foreign court to transmit its original records: a certified copy substantially satisfies the commission. In *Atkins* v.

(a) *Friday, June 2d. Before Lord Denman C. J., Littledale, Patteson, and Williams Js.*

Palmer

Palmer (a) the commission required that the commissioners should reduce the examination of the witnesses into writing in the *English* language, and send the same to *England* with a certificate how the oath was administered to such witnesses as did not understand *English*; and power was given to swear an interpreter to interpret the oath, interrogatories, and depositions. The depositions were returned in *English*, with the interpreter's oath that he had made a faithful translation of the depositions from the originals in the foreign language, which he had faithfully engrossed on the parchment containing the depositions; and it appeared that the depositions were taken six weeks before the translation was made. It was objected that this was not a compliance with the commission; but the Court held it sufficient; and *Abbott* C. J. said that the commission "cannot be understood to mean that they are to send the identical paper or parchment on which they make their minutes." [Lord *Denman* C. J. I think that is said merely of the first rough minutes as distinguished from the perfect minutes.]

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Sir *F. Pollock*, *Wightman*, and *Cowling*, contra. This document professes, on the face of it, to be a copy of the depositions taken: the commission requires that the depositions themselves shall be sent. The indorsement on the commission certifies the execution merely by reference to the copy. The document sent is not that which the persons to whom the commission is directed treat as their own final minutes; and this distinguishes the case from *Atkins v. Palmer* (a), where the com-

(a) 4 B. & Ald. 377.

missioners

1837. missioners did not keep back, as here, that which was finally treated as the original.

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Cur. adv. vult.

Lord DENMAN C. J. in this term, *June* 8th, delivered the judgment of the Court. We decide this case upon one very short ground. The principal evidence for the plaintiff was comprehended in the depositions taken under the commission. The commission required that, when the examinations were taken, *the same* should be sent. But it is clear that what was sent was not the same as that which was taken under the commission. There has been the intervention of a person professing to be an officer of the foreign court. Whether he was, such an officer or not we ought not to enquire: the very thing which we require ought to be in Court: no copy is admissible.

Rule absolute for a new trial (without costs).

Thursday,
June 8th.

The KING *against* BURN.

A magistrate applying for a criminal information for slanderous words ad-

dressd to him in the execution of his duty, made an affidavit as to the subject of complaint, in which he stated the defendant to be a litigious and shuffling person, and related a former dispute between him and his son, involving circumstances discreditable to the defendant. The latter statement was made, professedly, in explanation of some words used by the defendant on the occasion when he spoke those more particularly complained of, but it did not bear upon the merits of the complaint.

Held, that the above statements were impertinent and censurable; but the Court did not, therefore, reject the affidavit; and it noticed the statements as shewing, unfavourably to the prosecutor, the spirit in which he had probably acted when the alleged offence took place.

If an affidavit purport to be sworn before a commissioner by *A. B.* of *C. D.*, in the parish of *E.* and county of *F.*, and the jurat state the affidavit to be sworn "at *C. D.* aforesaid:" *Quære*, whether the jurat be insufficient as not stating the county in which the oath was taken?

magistrate

magistrate on the hearing of a summons before him for non-payment of wages. The magistrate's affidavit, on which, among others, the rule was obtained, began "*A. B. of Ross Moor Lodge, in the township of M. and parish of T. in the county of*" &c. (giving his addition, and stating him to be a justice of the peace, &c.), "maketh oath and saith" &c. The jurat was "sworn at *Ross Moor Lodge* aforesaid, the 31st day of *October* 1836, before me, *Nathaniel Holmes*, a commissioner &c." The deponent, in his statement introductory to the setting forth of the words, related the proceedings on the summons, which had been obtained against *Burn*, and he stated that "the said *Thomas Burn*, who bears the character of a most litigious, shuffling man, tried by every possible means to avoid payment." He also deposed that *Burn*, on the occasion when he spoke the other offensive words now complained of, said that "this deponent had threatened to make him pay his son some wages, but that this deponent was afraid to do so." The deponent added, that "the transaction relative to the son and the said *Thomas Burn*, referred to by *Burn*, is as follows;" and he then went into a narrative of that dispute, stating that a complaint had been made before the deponent against *Burn* by his son for non-payment of wages, and that the father had refused to pay any money unless the son would give him a receipt on a stamp for the whole of the last year's wages, although nothing had been paid on that account." The deponent also stated an observation of his own to the son at the time of the last-mentioned proceeding, that *Burn* "was a very shifty man, and required forcing on such occasions."

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against
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Bliss

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Bliss now shewed cause. First, the jurat of the magistrate's affidavit upon which this rule was obtained does not state any county in which the deposition was taken; the affidavit is therefore inadmissible: *Rex v. The Justices of the West Riding* (a). [Lord Denman C. J. The place appears here by reference.] It ought to be mentioned in the jurat itself. The word "aforesaid" in the jurat cannot aid, because it refers to something in the body of the affidavit, and that cannot be read till the Court sees that there is a proper jurat. In *Rex v. Cockshaw* (b) an affidavit with a jurat which did not state the place of swearing was held inadmissible. [Patteson J. That was a case of total omission (c).] Further, the affidavit here ought not to be received, because it contains matter which is libellous and not material to the application: *Sanderson's Bail* (d). [Lord Denman C. J. Has the Court ever refused to act upon such an affidavit, if it contained sufficient matter to support the application? What order they might make on account of such matter having been introduced, may be a different question.] In the case just cited, *Best J.* would not allow the affidavit to be read, though the objectionable statements in it were perhaps more relevant than those in question here. The words are clearly slanderous, though perhaps not in a high

(a) 3 M. & S. 493.

(b) 2 Nev. & M. 378.

(c) It appears, on reference to the papers in that case, that the jurat was as follows: — "These affidavits, contained on this and twelve preceding sheets of paper, were sworn to by the above-named deponents" (naming them), "this 17th day of April 1833, before me, William Freer, a commissioner for taking affidavits in the Court of King's Bench." The rule (for a criminal information for a libel on the corporation of Leicester) was discharged, November 7th, 1833.

(d) 1 Chitt. Rep. 676.

degree;

degree; but a party applying for a criminal information ought, himself, to appear before the Court free from blame. [*Petteson J.* In a case in 2 *Dowl. P. C.* (a), where the rule had been obtained on an affidavit containing libellous and irrelevant matter, the Court of Exchequer made the rule absolute without costs.]

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Alexander, contra, was then called upon by the Court. It is clear that the words spoken by *Burn* would authorise granting an information; and there is no instance in which a reflection on character, contained in an affidavit, has been held sufficient ground for rejecting an application otherwise well founded. The facts deposed to shew that the language applied to *Burn* is merited. Then as to the jurat. [*Lord Denman C. J.* and *Littledale J.* We do not decide on that.]

LORD DENMAN C. J. The prosecutor has stated a sufficient case for a criminal information; but he has, in the early part of his affidavit, introduced words irrelevant, and reflecting on the character of the party against whom he applies; and afterwards, in explanation of something which he states to have passed, he goes into a narrative of matters impertinent to the cause, and calculated only to prejudice the minds of the Court. Parties who come before the Court with affidavits are to confine themselves to the simplest statement of that which induces them to make the application, and are not to enter upon discussions like this,

(a) *Thompson v. Dicus*, 2 *Dowl. P. C.* 95. *S. C.* 1 *Cro. & M.* 769. 3 *Tyrrah.* 874.

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unless the nature of the subject renders them absolutely necessary. And we must say, here, that the spirit which has been shewn in framing the affidavit makes us doubt whether the spirit evinced by the prosecutor, at the time when this party came before him, was not such as might lead to what is now complained of. The Court cannot make the rule absolute. As to *Rex v. Cockshaw* (a), the point as to the sufficiency of the jurat does not seem to have been argued on behalf of the prosecutors; and, considering how many affidavits are sworn with the same form of jurat as that now before us, we do not wish unnecessarily to go into any observation on the subject.

LITLEDALE, PATTESON, and WILLIAMS Js. concurred.

Rule discharged without costs (b).

(a) 2 Nev. & M. 378.

(b) As to scandalous matter in affidavits, see *Rex v. Payn*, 6 A. & E. 392.

1837.

DOE on the Demise of JOHN WINDER and
MARY, his Wife, against ROBERT LAWES.

Thursday,
June 8th.

ON the trial of this ejectment before Lord Denman C. J., at the Surrey Spring assizes, 1835, a verdict was found for the plaintiff, subject to the opinion of this Court on the following case.

The action was brought for one undivided third part of copyhold premises, situate at *Kingston Bottom*, and held of the manor of *Ham*, in *Surrey*. The declaration contained two demises by the lessors of the plaintiff, one on the 24th of *November* 1825, the other on the 31st of *December* 1834.

Mary Winder (the lessor of the plaintiff) is one of three sisters of *Philip Cawston* the elder, hereinafter mentioned, and one of the aunts and co-heiresses of *Philip Cawston* the younger, hereinafter mentioned, and claims as such co-heiress by descent. The descents, as regulated by the customs of the manor, are shewn by the following extract:—

The roll of customs made the 1st day of *May*, in

band." Held (the will and codicils being prior to stat. 7 W. 4. & 1 Vict. c. 26.), that *S.* took only a life estate in the copyhold.

2. *J.*, the devisor's heir at law, never was admitted, nor surrendered to the use of his will. Before stat. 55 G. 3. c. 192., he devised all his copyhold to *S.* in fee, and he died in *S.*'s lifetime, after that statute passed. *S.* was admitted, after the death of the first devisor, and after the making of *J.*'s will, but before his death, to hold according to the first will. Held, that *J.*'s devise passed the copyhold to *S.*, even assuming *J.* not to have been virtually admitted; but that, also, the admittance of *S.*, the tenant for life, operated as an admittance of *J.*, the reversioner.

3. *S.* was never admitted after *J.*'s death. She devised, after stat. 55 G. 3. c. 192., to her two customary heirs and *H.* in fee; and the three, after her death, were admitted each to an individual third, on producing the will. Held, that her life estate had merged in the fee devised to her by *J.*, and that the effect of her admittance was therefore spent, and her devise inoperative for want of admittance.

4. But that the two customary heirs had each a perfect legal estate in his third.

5. That *J.*'s heir at law had a good title to support ejectment for the remaining third.

1. Copyholder in fee devised to his wife *S.* freehold estates named in the will, together with personalty (making her sole executrix), to be freely possessed and enjoyed by her during her life, remainder over to children; and, if they died before *S.*, to be disposed of by *S.*'s will. By a codicil he bequeathed certain money to *S.* By a second codicil he devised and bequeathed to *S.* "all my copyhold in the hamlet of *H.*," "and likewise all monies lent out upon mortgage, bonds, or notes of

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the 25th year of the reign of King *Edward* the Fourth, &c.

“ That, if any tenant die seised, that which must descend of right ought to descend by the custom of this manor to the younger son and his heirs; and, if he have no son, to the youngest daughter and her heirs; and, if she die without issue, then it to remain to the next of the kin; and, if there can be none found of the kin then to make claim to the lands, that then the lord shall by our customs seise it into his hands as escheat for lack of heirs general.”

On 30th of *November* 1804, the Earl of *Dysart*, the lord of the manor, granted to *Philip Cawston* the elder two pieces of the waste of the manor, to hold to him and his heirs at the will of the lord, according to the custom of the manor, at the yearly rent of 10s. *Philip Cawston* was thereupon admitted, and, on the 5th of *December* following, surrendered to the use of his will. He had made his will before the above grant, namely, on 29th of *September* 1791. He afterwards made two codicils. Extracts from the will and codicils follow. “ I, *Philip Cawston*, senior, of” &c., “do make and ordain this my last will and testament.” “ I give, devise, and dispose of the same (a) in the following manner and form. I give and bequeath to *Sarah*, my dearly beloved wife, my freehold in *Hertfordshire*, and my estate in *Petty France*, *Westminster*, all my right and title to the *Robin Hood* premises, in *Kingston Bottom*, in the parish of *Ham* (county of *Surrey*), and all my household furniture, together with my clothes, and book debts, and my plate, and stock in trade, whom I likewise constitute,

(a) There was nothing previously mentioned to which the words “ the same ” could refer.

make,

make, and ordain the sole executrix of this my last will and testament, by her freely to be possessed and enjoyed during her life, and, at her demise, my children to have equal shares. If my loving children die before their mother, *Sarah Cawston*, she is at her free will to give and bequeath the aforesaid property to whom she please." Dated 29th September 1791.

"*N. B.* — I likewise give, devise, and bequeath to *Sarah*, my dearly beloved wife, all monies in the hands of *Biddulph, Cocks, and Ridge*, bankers, *Charing Cross*, and all money that may at any time be put into the Bank of *England* or lodged elsewhere." Dated October 28th, 1799.

"I likewise give, devise, and bequeath to *Sarah*, my dearly beloved wife, all my copyhold in the hamlet of *Ham*, in the parish of *Kingston*, and in the county of *Surrey*, and likewise all monies lent out upon mortgage, bonds, or notes of hand." Dated 20th September 1805.

Philip Cawston had only two children, *Philip* and *Sarah*. The latter died at the age of six years, before her father. In 1811, the testator died, leaving his widow and his son *Philip* surviving; and his will and codicil were proved by his widow and executrix, 14th June 1811.

On 15th June 1812, at a court held for the manor, the homage presented the death of *Philip Cawston*; and, at the same court, *Sarah Cawston*, by *Philip* her son, came and brought into Court the probate of *Philip Cawston's* will, and was admitted to hold the same according to the will of her late husband, at the will of the lord according to the custom, &c. She never surrendered the premises to the use of her will. *Philip Cawston*, the son, was never admitted as tenant, in reversion

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reversion or otherwise, nor were the premises surrendered to the use of his will, which is dated 18th *March* 1811, and of which the following is an extract: "I do constitute and appoint my beloved mother, *Sarah Cawston*, whole and sole executrix to this my will; and, further, I do hereby bequeath and give unto my said mother and executrix all and singular my whole and sole property I may die possessed of, or having right or title to, in money, goods, clothes, leasehold, copyhold, or freehold, bank stock, annuities, mortgages, bonds, notes, or any hereditary property I may either die possessed of, or have any legal claim or expectation to the same." Dated 18th *March* 1811. *Philip Cawston*, the son, died in 1819, unmarried.

Amongst the rules of customs pertaining to the manor is the following (viz.). "The seventh part of our custom is that, if any tenant which holdeth land of our sovereign Lord the King do sue it out of the said Court without licence of the lord of the soil, he to forfeit all his copyhold which he hath lying within the lordship, except it be brought out by the commandment of the King, or his most honourable council; and, furthermore, whether he came to it by inheritance or by purchase, and so holding it to him his heirs or assigns, and so at the hour of his death deliver or surrender to his next heir; and, if so be that after the death of any such tenant the heir doth give, set, or lay to mortgage any copyhold land lying within any of the said lordships, before the said heir be admitted and hath paid his fine according to the custom and manor of the said lordships, that then their sale, grant, surrender, or mortgage, made by the said heir, shall stand clearly void and of none effect by our custom."

Sarah

Sarah Cawston was not admitted under the will of her son, nor did she prove his will. She died on the 25th of *October* 1825. Letters of administration with the will annexed of *Philip Cawston* the younger, were, on 25th *February* 1826, granted to her executors.

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On the 2d of *July* 1824 *Sarah Cawston* made her will, whereby she devised all her estates, freehold and copyhold, to *S. Holder*, *D. Cork*, and *S. Baxter* (the two last of whom were her nephews and heirs at law); who, at a court of the manor, held on the 18th *July* 1826, produced the letters of administration with the will annexed of *Philip Cawston* the son, and paid to the lady of the manor their fine upon the neglected admission of *Philip Cawston* the son, and were severally admitted to an undivided third (a) of the copyholds in question.

The case was argued in *Michaelmas* term last (b).

Mansel for the plaintiff. *Mary Winder*, the lessor of the plaintiff, is entitled to one undivided third part of the copyhold premises claimed, as one of the three co-heiresses of *Philip Cawston* the younger, unless *Sarah Cawston's* devise passed the property. First, *Sarah* could not make title to the fee as devisee of *Philip Cawston* the elder. His will cannot act upon the property, it having been made before he acquired it. The question then arises on the second codicil, by which he bequeaths to *Sarah* "all my copyhold" in &c. That gives only a life estate. It is true that *Sarah* was admitted to hold according to the will; but, though the

(a) See the judgment, post, p. 211.

(b) *November* 18th, 1836. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

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admittance of a tenant for life may operate as an admittance of the remainder-man, here no remainder is devised; therefore the admittance operated only for her life. *Philip Cawston* the younger was reversioner in fee as heir-at-law.

Next, though *Philip Cawston* the younger devised the fee to *Sarah*, yet, first, as he not only never surrendered, but never was admitted, his will cannot pass the property; and, secondly, as *Sarah* was never admitted her devise passes nothing. If it be said that the title descends on the heirs of *Sarah*, and that, therefore, it is unnecessary to insist on her devise, the answer is that *Mary*, the lessor of the plaintiff, is the co-heiress of the last person seised of the fee who was actually admitted.

Hodgson, contra.

First, as to the second codicil to the will of *Philip Cawston* senior. Where words express the whole interest of the deviser, and cannot be understood as referring simply to the locality, or other peculiar description of the subject-matter of devise, the devisee takes the fee. The cases cited for the plaintiff in *Doe dem. Hickman v. Haslewood* (a) illustrate this position. Here, too, the rest of the testamentary disposition strengthens this construction. The deviser manifestly did not mean to die intestate as to any portion of his interest in either realty or personalty. The will gives the freehold property for life and in remainder expressly: the two codicils give personalty absolutely to the wife: the inference is, that the deviser meant to dispose of his

(a) 6 A. & E. 167. (Argued on the same day with the case in the text.)

whole

whole interest in the copyhold, since he disposes of his whole interest in the freehold and personalty. It is evident that he meant his copyhold to pass like the personalty mentioned along with it in the second codicil, that is, the whole of his interest to the wife absolutely. *Roe dem. Gillard v. Gillard* (a) and *Doe dem. White v. Simpson* (b) are in point (c). "All my copyholds" means all that the deviser holds by copy, that is, his whole estate, held to him and his heirs at the will of the lord. "Freehold" and "estate" are used in the will as synonyms.

Next, assuming that *Philip Cawston* senior's will passed to *Sarah* only a life estate in the copyhold, still she would take the fee under the will of *Philip Cawston* junior, upon whom, on that assumption, the reversion would descend. First, as to the objection that he was not admitted and had not surrendered. That is immaterial: *Right dem. Taylor v. Banks* (d), *King v. Turner* (e), in which last case Lord Brougham C. overruled the decision of Sir L. Shadwell, V. C. (g), who seems to have relied on *Smith v. Triggs* (h). And it was considered, in *Doe dem. Smith v. Bird* (i) (where *Doe dem. Clarke v. Ludlam* (k) was recognised), that an express or implied devise of copyholds, made before stat. 55 G. 3. c. 192., would pass them without surrender, though it was held that the statute could not alter the construction as to the presumption of intent, and therefore that general words in a devise made before the statute, will

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(a) 5 B. & Ald. 785.

(b) 5 East, 162.

(c) See *Roe, Lessee of Shell v. Pattison*, 16 East, 221.(d) 3 B. & Ad. 664. See *Doe dem. Perry v. Wilson*, 5 A. & E. 321.

(e) 1 Myl. & K. 456.

(g) *King v. Turner*, 2 Sim. 545.

(h) 1 Str. 487.

(i) 5 B. & Ad. 695.

(k) 7 Bing. 275.

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not pass copyholds not surrendered, where there is also freehold property, the want of surrender rebutting the presumption of intent. Here, however, the will of *Philip Cawston* junior, though made before the statute, contains an express devise of the copyhold. But, further, it is not correct to say that he never was admitted. *Sarah Cawston* was admitted after the death of *Philip Cawston* senior. Then, if she was (as the plaintiff contends) only tenant for life, *Philip Cawston* the younger was reversioner in fee. Now the admittance of tenant for life is the admittance of the remainder-man; *Coke, Copyh. s. 41. (a), Church v. Mundy (b)*; and there can be no distinction, as to this, between a reversioner and a remainder-man (*c*). Livery of seisin to the particular tenant of the freehold enures to all in remainder and reversion. It is true that the admittance of *Sarah* was subsequent to the date of the will of *Philip Cawston* junior. But an admittance of *Philip Cawston* junior would have related, so as to give effect to his will; and, therefore, *Sarah's* admittance, which has the effect of admitting him, likewise gives effect to the will. In *Rex v. Dame St. John Mildmay (d)* it was held that an admittance had not relation to a surrender, so as to defeat a forfeiture for felony committed by the surrenderor between the surrender and the admittance; but that rule does not apply to parties claiming, not against the lord, who is a stranger, but through the same party. In *Carr dem. Dagwell v. Singer (e)* *Willes C. J.* said (*g*), "When there is a will and admittance, that has a retrospect to

(a) And see *ib. sect. 56. p. 130, and suppl. sect. 7. p. 162. (Ed. 1764.)*

(b) 12 *Ves.* 426. See *p. 431.*

(c) See *Bulleyn and Graunt's Case, 1 Leon. 174.*

(d) 5 *B. & Ad.* 254. (e) 2 *Ves. sen.* 603. (g) *P.* 609.

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the surrender to all intents." For the defendant's case, here, it is not necessary to carry the doctrine so far. It is sufficient that the admittance relates back to the death of *Philip Cawston* senior (a), the statute supplying the surrender.

Then, as to the argument that, for want of *Sarah's* admittance as devisee of her son, her devise was inoperative. First, after she was admitted and was in of an estate for life (assuming that to have been so), the devise to her in fee enlarged the life estate into a fee, and no subsequent admittance was requisite. That such would be the effect of a devise of freehold property in fee to a tenant for life is clear; and no distinction can be suggested between freehold and copyhold in this respect. If, indeed, it be held that, on the devise, the life estate merged in the fee, the effect of *Sarah's* admittance was done away with. But the devise worked an enlargement, not a merger. If remainder-man in fee release to tenant for life, that does not create a totally new estate¹ in the tenant for life, but simply enlarges his estate to a fee. The remainder-man might, indeed, carve out of his remainder a new estate for life; but he cannot give to the tenant for life the immediate remainder in fee without enlarging the old estate for life into a fee. Remainder-men and reversioners are indeed sometimes admitted; but it is unnecessary. The lord can insist only upon having a tenant: that claim is satisfied if the tenant for life has been admitted; and, on his death, the remainder-man, who is now to become tenant, is admitted, and the lord gets a fine. *Sarah* was admitted under

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(a) See *Holdfast dem. Woollams v. Clapham*, 1 T. R. 600. *Rex v. The Lord of the Manor of Oundle*, 1 A. & E. 283.

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the will of *Philip Cawston* senior; but an admittance even contrary to a title enures to the real title of the party admitted: *Coke, Copyh.* sect. 41. p. 92. (a), *Church v. Mundy* (b). Indeed, a fresh admittance, under the devise of *Philip Cawston* junior, would have worked a merger of *Sarah's* life estate, which the lord clearly had no right to demand. But, again, even if her devise be inoperative, her heir-at-law is the party to take. Now two of her devisees are her customary heirs-at-law. A third party (who on this supposition has no claim) was indeed admitted; and the admittance was under the devise; but that, as before, must enure to the real title: the admittance, therefore, in this view of the case, is effectual as to the two heirs; and, as to the other party, is a mere nullity.

Mansel in reply. As *Sarah* was admitted only under the will of *Philip Cawston* the elder, her admittance enures only for the life estate. The principle, that the admittance enures to the reversioner, applies, at the utmost, to a remainder-man only, who is distinguished, in this respect, from the reversioner, *Co. Copyh. Supp.* s. 7. p. 162, 163. (a), referred to in note (c) to *Doe dem. Whitbread v. Jenney* (c). The remainder is, in fact, parcel of the same estate as the tenancy for life. Wherever the lord is entitled to a new fine on the expiration of the life estate, there ought to be a new admittance; *Tiping v. Bunning* (d). As to the last point, the admittances were under *Sarah's* devise, which was inoperative; they are therefore mere nullities.

Cur. adv. vult.

(a) Ed. 1764.

(b) 12 Ves. 426. See p. 431.

(c) 5 East, 527.

(d) Moore, 465.

Lord

Lord DENMAN C. J. now delivered the judgment of the Court.

It is admitted, in this case, that the lessor of the plaintiff, *Mary Winder*, as one of the customary co-heiresses both of *Philip Cawston* the father, and *Philip Cawston* the son, has a good title to the copyhold in dispute, unless the inheritance of it has been effectively disposed of, either by the last codicil to the will of the former, or by the will of the latter. Two points have accordingly been made in the argument for the defendant: the first, that an estate in fee passed by the codicil to the will of *Philip Cawston*, senior, to *Sarah Cawston*, under whom the defendants claim; the second, which arises only if the first is not sustainable, that she took the same estate under the will of her son, and that it has passed to the defendants, or some of them. (His Lordship then read the second codicil to the will of *Philip Cawston*, senior.)

It was contended that the words, "all my copyhold," were equivalent to "all that I hold by copy;" and, if so read, even by themselves, must be taken to import, not merely the land so held, but the interest in the land, i. e. the estate: that this meaning, if doubtful in itself, was rendered clear by the juxta-position, in the same sentence, of the words, "all monies lent out upon mortgage," &c.; as to which it was clear that the testator's whole interest would pass absolutely to *Sarah Cawston*. Moreover, reading the codicil in question with the will itself, and the prior codicil, it is said that a clear intention on the part of the testator may be collected to die intestate as to no part of his property; and, further, that in the will itself, where there was an intention both as to realty and personalty to limit the interest of the wife, first given her, to a life estate,

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the testator, an illiterate person, making his own will, has evinced his own understanding of the manner in which such an intention might properly be carried into effect, by adding express words of restraint; and that a contrary intention to give the whole interest must be inferred from the absence of any such words in the codicil in question.

The argument, therefore, for the defendant rests upon the import of the express words, and upon the evidence of intention to be collected from the face of the will. We are of opinion that the words themselves, even read as we are desired to read them, and conjoined with the other bequest in the same sentence, are not sufficient to carry the fee. The property appears to us to be described only by its tenure and local situation, and that these words of description do not include the quantity of interest in the testator; see *Right, Lessee of Mitchell*, v. *Sidebotham* (a). In *Doe dem. Wright* v. *Child* (b), and *Doe dem. Child* v. *Wright* (c), where the same devise received a construction of the Courts of Common Pleas and King's Bench, the words, "all my lands, freehold, copyhold, and leasehold, in the county of *Essex*," were held to pass only an estate for life in the freehold and copyhold: and in *Doe dem. Norris* v. *Tucker* (d), a case very much resembling, but somewhat stronger than, the present, a devise to sons, "share and share alike, equally to be parted between them" (after the death of the testator's wife), of "the above bequeathed lands, goods, and chattels," was held to give them only an estate for life, though the "above be-

(a) 2 *Douglas*, 759.(b) 1 *N. R.* 335.(c) 8 *T. R.* 64. See *Doe dem. Child* v. *Wright*, 7 *East*, 259.(d) 3 *B. & Ad.* 473.

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queathed lands" were first specifically bequeathed for life as "my freehold *estate* called *Pouncetts*."

The argument, therefore, is reduced to the evidence of intention: and, certainly, no one can read the will and codicils attentively without forming, at least, a strong opinion that the testator intended to give to his wife the whole and absolute interest in the copyhold in question. But cases, too clear and numerous and standing on too strong a principle to be over-ruled by us, have decided that, where the words used by a testator in any devise can be satisfied by understanding them in their ordinary meaning (and, if the words be technical, the technical is their ordinary meaning), and where the whole of the will does not make it a *necessary* inference that they were used in any other, the Court cannot give them any other. Our duty is to ascertain the intention of the testator by what he has written; and, in so doing, for the sake of uniformity of decision, we must take him to have used his language in its ordinary meaning, if it bears any, and unless, by so doing, we necessarily contradict an over-ruling intention unequivocally expressed in the context. Tried by this rule, we think it clear that a life estate only in the copyhold in question passed by the codicil. And we therefore proceed to the second and more important point in the argument for the defendant.

This second point is, that *Sarah Cawston* took an estate in fee in the copyhold under the will of *Philip Cawston* her son, which, it was not disputed, contained words sufficiently large for the purpose. This assumes that the reversion descended on him; and the facts stand thus. *Sarah* was admitted "to hold according to the will of her husband." The heir at law was never
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separately admitted, nor did he ever surrender to the use of his will. In 1811, and before the admission of *Sarah*, he made his will, and devised the reversion to her in fee; and died in 1819. She was not admitted under that will, nor administered to it; but she devised over to the defendants by a will made in 1824, and died in 1825. Two of the defendants are her customary co-heirs; and all have been admitted.

As the will of *Philip Cawston*, junior, contains an express devise of copyholds, and he died after the passing of stat. 55 G. 3. c. 192., it seems clear, upon the words of that statute, and the authority of *Doe dem. Smith v. Bird (a)*, that the mere want of a surrender by him would be cured. But it was contended, in the first place, that his devise without surrender was inoperative for want of his previous admission. Now, unless there be a distinction in principle, as to this point, between the devise of an estate which has descended in possession on the heir at law, and that of a reversion so descending, the case of *Right dem. Taylor v. Banks (b)* is a direct and considered authority that admittance is not necessary. It is difficult to see how there can be any distinction between the two supposed cases. Upon the death of the father in the present case, and before the admittance of the widow, the whole legal estate descended in possession on *Philip*, the heir at law; *Roe dem. Jeffereys v. Hicks (c)*. At that time he might have made a valid surrender before admittance; and his will, after such surrender and without any admittance, would have passed the estate. The extent to which the will would have operated *beneficially* might have been sub-

(a) 5 B. & Ad. 695.

(b) 3 B. & Ad. 664.

(c) 2 Wilson, 13.

ject in equity to the equitable rights of the devisee for life under the prior will; but, at law, the legal estate must have prevailed.

Thus it would have stood if the devisee for life never had been admitted; and this case would then have been precisely the same as that of *Right dem. Taylor v. Banks (a)*. But how can her admittance, her interest being only as tenant for life, prejudice the heir's legal estate, or the operation of his will, beyond the extent of her interest? Her admittance would, indeed, turn his estate into a reversion; but, as reversioner, he would equally be in the seisin as before: he might equally surrender that interest (*Colchin v. Colchin (b)*); indeed, before the passing of the statute, *must* equally have surrendered it, in order to make an effectual devise: after a surrender, the interest would have been equally devisable; and, if so, the statute operates and makes it devisable without such surrender. Accordingly, in the case of *King v. Turner (c)*, it will be seen that the testator, whose devise without admittance was held to be operative, was an heir-at-law on whom a copyhold had descended in reversion, subject to the free bench of the widow, *durante viduitate*.

Thus we come to a conclusion that the want of an admittance by the heir at law will not prevent the operation of his will, on the ground, first, that it could not have that effect if the devisee for life never had been admitted; and, secondly, that her admission subsequently to the devise cannot prejudice its operation upon the reversion. It is perhaps, therefore, unnecessary to consider a further answer which was given at

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(a) 3 B. & Ad. 664.

(b) Cro. Eliz. 662.

(c) 2 Sim. 545. 1 Myl. & K. 456.

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the bar to this objection; that *Philip*, the son, was in fact admitted, by virtue of the admission of *Sarah*: but it may be as well to dispose of that point also.

The authorities are numerous and clear to shew that the admission of the particular tenant is the admission of the remainder-man also; and the principle on which that has been laid down applies equally to the reversioner; namely, that the particular estate and the remainder make but one estate. And, as to a distinction, which may exist in respect to the lord's fine between the two cases, that will not be material upon the present point, which regards only the vesting of the estate for the purpose of transmission. Nothing is found in the present case, as to any special custom with regard to the lord's fine, which affects the question now before us: in the absence of any such custom, the payment of the fine is collateral to the vesting of the estate; and our decision of this case, as between these parties, will not in any way prejudice the lord's right. Some observations were made upon the form of *Sarah Cawston's* admission; but we think that immaterial: the form of admission, whatever it may be, enures according to the title. And we accede to the argument that the admittance, when once made, had relation back to the period when the will came into operation, i. e. the death of the surrenderor. *Sarah Cawston* became full tenant by her admission from that moment; and, whatever effect her admittance had on the reversion in her son, it equally had from the same point of time. The general doctrine of relation in the case of admittance is familiar and clear; and we see no ground for any distinction. Assuming, therefore, that admittance was necessary to give effect to the will of *Philip Cawston*, the son, we are of opinion that he was de facto admitted.

There

There remains, however, one difficulty to be considered in the title of the defendants. *Sarah Cawston* was never admitted under the will of her son; and, as a general rule, nothing is clearer than that the *devisees* of an unadmitted devisee have no legal title, without a surrender from the heir at law of the testator: *Smith v. Triggs* (a), *Wainwright v. Elwell* (b).

Two modes are suggested, at the bar, by which this difficulty may be met: the first, that a tenant for life, once admitted as such, to whom the reversion comes by devise, needs no second admission in respect of such reversion; the second, that, her heirs having been admitted, that admittance will relate back to the surrender, or that statutable equivalent to a surrender made to the use of the will, under which their ancestor would have taken.

The statement in the case must be taken to import, and from a transcript of the admissions, which has been sent us, it appears, that the devisees have each been admitted to an undivided third of the copyholds in question; if so, there is a third of the land now in dispute to which the two, who are also customary heirs, have not been admitted in any capacity; and therefore this second answer, if satisfactory in itself, will still leave the defendants undefended as to that one third. It is proper, therefore, first to consider the answer which applies to the whole.

Upon this point, it was argued that the devise of the reversion to the tenant for life operated by way of enlargement of her estate; that the life estate was not merged, although it was admitted that it did not remain

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(a) 1 *Strange*, 487.(b) 1 *Madd*, 627.

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distinct from it; that the life estate, therefore, still remaining in esse in a certain sense, though united with the fee, no new admittance in respect of the fee was even possible; and that the former admittance enured, not merely according to the estate which the tenant for life at that time had, but, also according to her estate in its altered condition. No authorities were cited in this part of the argument; and, after some search, our decision must rest on analogy and principle, rather than any decision in point.

It seems to us difficult to say that the life estate in this instance did not merge. A devisee takes by purchase; and, although it be true that, without any act done by him, such as entry, or express declaration, to shew his assent, the estate, by presumption of law, vests in him immediately on the death of the deviser (*Cal. Lit.* 111 a.), yet that this is founded on a presumption of fact, that he assents to what is for his benefit, is clear from this, that he may by certain express acts of dissent waive the devise before entry, *Townson v. Tickell* (a), *Doe dem. Smyth v. Smyth* (b). If then the devisee, tenant for life, has taken the reversion by purchase, is this any thing more than an ordinary case of merger? The two estates have come together in the same person; but they cannot coexist in the same person without involving many legal inconsistencies: the lesser, therefore, by the rule of law, is drowned or annihilated in the greater. Mr. *Hodgson*, who argued this case most ingeniously for the defendants, seemed to be aware of the consequences of our holding the life estate to be merged: they are indeed obvious. By the admission de facto of

(a) 3 B. & Ald. 31.

(b) 6 B. & C. 112.

Sarah Cawston under her husband's will, we have held that she was admitted to her life estate, and her son inclusively, if necessary, to the reversion. This latter effect was, of course, spent upon the death of the son; and, if the reversion cannot vest in her without immediately annihilating her life estate, the first effect of the admission will, upon that event, be equally spent, and a new admission will consequently be necessary. This case, therefore, falls within the general rule, and the title of *Sarah Cawston's* devisees, as such, cannot prevail; *Doe dem. Vernon v. Vernon (a)*.

It is, therefore, necessary to consider the second answer, which rests the defendant's case upon the title of the admitted heirs; and we are of opinion that, to the extent of the two thirds to which they have been respectively admitted, that ought to prevail. The devisee under a will of copyhold is in substance no other than a surrenderee, though not immediate, to the uses of the will. In this respect the statute, dispensing with the necessity for an actual surrender, has made no difference. As such surrenderee, he is entitled to admittance; and, if he dies before admittance, his customary heir is entitled in the same manner; and, when admitted, the legal estate is in him by relation from the surrender; 4 Co. 29 b. (b), *Bac. Abr. Copyhold*, (G), 8. (c), and *Vaughan dem. Atkins v. Atkins (d)*. In this respect, the case of the heir of such devisee or surrenderee differs from that of the devisee of either; the latter, claiming only under the will of the unadmitted devisee or surrenderee, does not by admittance connect himself with the first devisor or surrenderor, in whose heir the legal

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(a) 7 East, 8.

(b) *Bunting v. Lepingwell*.

(c) Vol. ii. p. 218. (7th ed.).

(d) 5 Burr. 2787.

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estate remains: there would appear, as observed by *Lawrence J.* in the case of *Doe dem. Vernon v. Vernon* (a), a chasm in the court rolls between the surrender to the use of one person's will, and an admittance under that of another. But the heir of the unadmitted surrenderee is in by descent, and represents his ancestor.

If this reasoning be correct, we think it clear, further, that the effect of this admission of the customary co-heirs of *Sarah Cawston* is not altered by the circumstance that they professed to be admitted as devisees. We have already had occasion to state that the admittance, where the lord is ministerial only, always enures according to the title. This is very clearly laid down in *Westwick v. Wyer* (b); and several cases are there stated fully establishing the position.

We are therefore of opinion that the lessors of the plaintiff are entitled to one third only of the land sought to be recovered in this action: and to that extent our judgment must be for them (c).

(a) 7 *East*, 24.(b) 4 *Co.* 28 b.(c) See *Wilson v. Weddell*, *Yelv.* 144.

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June 8th.

DOE on the Demise of MUDD against
SUCKERMORE.

This case is reported, 5 *A. & E.* 703.

Friday,
June 9th.

GUEST against ELWES.

This case is reported, 5 *A. & E.* 121.

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CHARLES FREDERICK, Baron De RUTZEN, and *Friday,*
MARY DOROTHEA, his Wife, *against* LLOYD. *June 9th.*

This case is reported, 5 *A. & E.* 456.

The KING *against* The Mayor, Aldermen, and *Friday,*
Town Council of the City and Borough of *June 9th.*
WINCHESTER.

SIR J. CAMPBELL, Attorney-General, in *Michael-*
mas term last, obtained a rule nisi for a mandamus
to the defendants to admit *William Henry Earle* and
John Dummer to vote and act as councillors of the town
council of the city and borough of *Winchester*, they hav-
ing been duly elected councillors for the ward of *St.*
John, within the said city &c., and having duly qualified
and accepted such office.

By the affidavits on which the rule was obtained,
the following facts appeared. In pursuance of stat.

names, some two. The majority on all the papers taken together, and also on the papers
having three names, was for *A.*, *B.*, and *C.* On the papers having two names only, it
was for *Y.* and *Z.* The alderman and assessors for the ward declared *A.*, *B.*, and *C.* duly
elected. Afterwards, the assessors published a declaration that *Y.* and *Z.* were duly elected.
A., *B.*, and *C.* took the declaration and acted. Afterwards *Y.* and *Z.* took the declaration,
and demanded to act, but were not permitted.

Held (before stat. 7 *W. 4.* and 1 *Vict. c. 78.*) that, even assuming that *Y.* and *Z.*
should have been declared duly elected, the office was full, de facto, of *A.*, *B.*, and *C.*, and
no mandamus could go to command the mayor, &c., to allow *Y.* and *Z.* to act.

A rule nisi having been obtained for a mandamus as above, *Y.* and *Z.* afterwards ob-
tained a rule for a quo warranto against *A.*, *B.*, and *C.* The Court refused to hear the
two rules discussed together; but, after discharging the rule for a mandamus on argu-
ment, they made the rule absolute for a quo warranto.

In a ward of a
borough, one of
the councillors,
the ward having
six, was chosen
for alderman.
His place was
not filled up
till the next an-
nual election of
councillors. At
that election,
no notice was
given that his
place was to be
supplied.
Some of the
voting papers
had three

1837. 5 & 6 W. 4. c. 76. (a), *Winchester* was divided into three wards. *St. John's* was one of these, and had two aldermen and six councillors for each ward. In 1835, the eighteen councillors were elected, the following six for *St. John's* ward, *Robert Knight*, *Henry Knight*, *John Vavasour Earle*, *John Benham*, *Richard Littlehales*, *William Henry Earle*, and in the above order, as to majority of votes. Afterwards, in the same year, *John Vavasour Earle* was elected alderman for *St. John's* ward, the other five aldermen, elected at the same time, being elected out of the burgesses who were not councillors. No new election of councillor for *St. John's* ward took place till 1836. On *November 1st*, 1836, *Littlehales* and *W. H. Earle*, as the two councillors who had been elected by the smallest number of votes in *St. John's* ward, went out of office (b). On the election of councillors which then followed, the alderman and assessors before whom the election for *St. John's* ward was held declared the result of the poll as follows :

<i>Richard Littlehales</i>	-	-	-	161
<i>Charles Witman Benny</i>	-	-	-	151
<i>Charles Wells</i>	-	-	-	139
<i>William Henry Earle</i>	-	-	-	95
<i>John Dummer</i>	-	-	-	66

adding, " And we do hereby further declare the said *Richard Littlehales*, *Charles Witman Benny*, and *Charles Wells*, to be duly elected councillors for the said ward." There were, in fact, 219 voting papers put in, of which 43 contained two names, and the remaining 176 contained three names, none of the latter distinguishing which of the three parties named was intended to supply

(a) Sects. 39, 40, 41. Sched. (A.) sect. 1.

(b) Sects. 43, 31.

John

John Vavasour Earle's place. If the papers containing three names were admissible, then (whether the papers containing two names only were admissible or not) the result of the election was as declared: but, if only the papers containing two names were admissible, then *W. H. Earle* and *J. Dummer* had the majority. No notice had been given that any election would be held to supply the place of *John Vavasour Earle*. On the close of the polling, and before the result was declared, certain burgesses protested in writing against any declaration in favour of *Littlehales*, *Benny*, and *Wells*, on the ground of irregularity in the election.

On 5th *November* 1836, the two assessors of *St. John's* ward signed and published at the Guildhall a declaration, that, being advised that the burgesses of the ward could not respectively then vote for a number of persons exceeding two, they did thereby (assuming such advice to be correct) make known that the declaration made, on *November* 2d, of the result of the election, was erroneous; and that, upon examination of the voting papers given for a number of persons not exceeding two, and excluding those given for more than two, they declared *W. H. Earle* and *J. Dummer* to be elected councillors for the ward, to supply the places of those who went out of office on *November* 1st.

After the publication of this declaration, *W. H. Earle* and *J. Dummer* duly qualified and accepted office as councillors, before two aldermen and seven councillors. On the 21st *November* 1836, they attended a meeting of the council, took their seats as councillors, and claimed to vote in the business of the day: but the mayor refused to recognise them as part of the council, or to permit them to vote on divisions which took place that day; and the

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the town clerk would not take their votes. At this meeting, *W. H. Earle* and *J. Dummer* tendered to the council their declarations and acceptance of office, required by stat. 5 & 6 *W. 4. c. 76. (a)*, enrolled on parchment, and also their oath of allegiance recorded on parchment as duly taken; and the council admitted that they had duly qualified themselves and accepted office.

The affidavits in answer stated that, on 3d *November* 1836, the mayor appointed a meeting to be held at the Guildhall on the following day, for the purpose of enabling the newly elected councillors to make the necessary declarations, of which notice was given by the town clerk to *Littlehales*, *Benny*, and *Wells*; that *Littlehales* and *Wells* attended accordingly, on the 4th *November*, at the Guildhall, accepted the office, and signed the declaration in the inrolment-book: that, at the same time, after some conversation, the mayor drew up and signed an instrument, now in the custody of the town clerk, as such, to the effect that, on reference to the mayor, it was determined that *Wells* should be the councillor to quit office in the room of Mr. Alderman *Earle*. That, on 5th *November* following, and before the signing and publishing of the declaration by *W. H. Earle* and *J. Dummer*, *Benny* accepted office and signed the declaration. That *Littlehales*, *Benny*, and *Wells* had since been summoned, and acted on all meetings of the council.

In *Easter* term last, Sir *J. Campbell*, Attorney-General, obtained a rule nisi for a quo warranto information against *Littlehales*, *Benny*, and *Wells*, and it was made part of the rule that this motion should come on for

(a) Sect. 50.

argument

argument at the same time with the motion for a mandamus. On the latter case being now called on in the peremptory paper,

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Sir *W. W. Follett* (with whom was *Crowder*,) contended that the application for a quo warranto ought not to be now heard, unless the rule for a mandamus were discharged, and with costs; and he observed that, upon the rule for a mandamus being granted and enlarged, the party impugning the present election had the affidavits in answer to that rule in their hands, and had availed themselves of this advantage, to set on foot a new application, involving the same matter of dispute.

Sir *J. Campbell*, Attorney-General, and *Erle*, contra. When the rule for a quo warranto was moved for, the Court was informed that the other rule was depending. [*Littledale J.* Is there any instance of two such rules being brought on together? If allowed, it would be a constant practice]. The rules are distinct, but stand next to each other in the paper; there is nothing irregular in their being disposed of together. [Lord *Denman C. J.* We cannot be blind to the fact that the cases are placed next to each other at your desire. You obtain a rule for a mandamus to admit because there has been no election of the adverse parties, and then a rule for a quo warranto because those parties have been improperly elected. It is an attempt to try your title in two inconsistent forms. *Littledale J.* The answer to the mandamus would be, that the office is full. The motion for a quo warranto assumes it to be full. *Patteson J.* The rule nisi for a quo warranto should not have been made in the present terms. To grant two such rules

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rules with the understanding that they should come on together was, in effect, granting a rule in the alternative (a)].

The Court then called on Sir *W. W. Follett* to shew cause against the rule for a mandamus.

Sir *W. W. Follett* (with whom was *Crowder*,) now shewed cause. Whether or not *Littlehales*, *Benny*, and *Wells* be removeable by quo warranto, it is clear that a mandamus cannot issue, because at present the office is full. Sect. 43 provides that the elections in boroughs having wards are to be conducted in each ward as in the case of elections for the whole borough; sect. 35. therefore applies, which directs that the mayor and assessors shall examine the papers, and that the mayor shall publish a list of the names of the persons elected. The publication has taken place; and the parties declared to be elected have acted. The subsequent declaration of the assessors is immaterial: after the election they were functi officio. (He was then stopped by the Court.)

Sir *J. Campbell*, Attorney-General, and *Erle*, contra. First, *W. H. Earle* and *J. Dummer* were duly elected. [Lord *Denman* C.J. Assume that for the present.] It follows that the office is not now full against them. In *Rex v. The Mayor of Colchester* (b) two parties claimed under the same election to be recorder, and one had

(a) See *Rex v. Beedle*, 3 A. & E. 467. Also an *Anonymous* case cited by *Lawrence J.* in *Rex v. The Corporation of Bedford Level*, 6 East, 360.

(b) 2 T. R. 259. See *Rex v. The Minister and Churchwardens of Stoke Damerel*, 5 A. & E. 584. *Rex v. The Mayor, &c. of Oxford*, 6 A. & E. 349.

acted;

acted; and the Court refused a mandamus. There the party acting had been admitted formally, and was sworn in; that created a plenary. But, under stat. 5 & 6 *W.* 4. c. 76., there is no analogous proceeding to vest the office. The party elected, by sect. 50., is to make the declaration of acceptance, which he may do before any two aldermen or councillors. This is no more than all the claimants may do, and, in this case, have done. The publication by the mayor or aldermen can have no effect. The party having the majority is to "be deemed to be elected," by sect. 35. Then the mayor is simply to publish the fact. The argument founded on the publication would shew that a party was actually in occupation of the office who had never come near the borough; for the mayor might make the publication in such a case. His office is that of returning officer only; and his return of the election does not put the party in actual possession. The applicants here demand to be allowed to act; which, if they be duly elected, they have a right to do. [*Patteson J.* Sect. 50. preserves the necessity of subscribing the declaration under stat. 9 *G.* 4. c. 17. s. 2., which must be made in one month after admission. Lord *Denman C. J.* It does not appear whether the parties now applying accepted the office by making the declaration mentioned in sect. 50. within five days, as directed by sect. 51.] The office is no more full by *Littlehales*, *Benny*, and *Wells*, than by the parties now applying.

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Lord DENMAN C. J. Under sect. 35. the alderman and assessors have examined the voting papers, and have deemed particular parties elected, all of whom have accepted within the five days; and these parties have
since

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since then acted. If that be not an admission, there can be no admission at all. If we were to grant this mandamus, we should be bringing opposite parties before us by alternate orders. The legislature cannot have intended to establish a state of things so liable to arbitrary and petty distinctions. I am of opinion that the office is full under the only authority created by the statute.

LITLEDALE J. I think the office is full. The persons now acting have been declared to be elected by the proper authority, and have made the required declaration themselves. It is argued that the rule which prevailed under the old system no longer applies, because a declaration before two aldermen or councillors is now substituted for the formal admission which took place before the corporate authorities. Under sect. 51. a party elected, who does not accept within five days, is liable to a fine. If an acceptance, such as that section prescribes, does not fill the office, I do not see how it ever can be filled.

PATTESON J. Assuming, for argument's sake, that the alderman has declared a party to be elected who, in fact, was not duly elected, it is clear that all the acts prescribed by the statute have been done, and that the office is full, whatever other claimants there may be. It is not the duty of the council to admit parties who have not been declared duly elected.

WILLIAMS J. I am of the same opinion; and I would not add any thing, except for the importance of distinguishing between cases where a mandamus is to go, and
 and

and cases where other methods of trying corporate rights are proper. Under the statute the office is here full. What more could be done? No additional step is suggested; and the argument really comes to this, that nothing at all, under this statute, can make the office full. The safest plan is to consider the office full when a party has been declared duly elected.

Rule discharged with costs (a).

(a) The rule for a quo warranto was afterwards made absolute, without any further intimation of opinion by the Court. See now stat. 7 W. 4. & 1 Vict. c. 78. s. 11.

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WATTS *against* FRASER and Another.

Friday,
June 9th.

CASE. The first count was for a libel in a work called *Fraser's Magazine*, ridiculing the plaintiff as editor of a publication called the *Literary Souvenir*, and attacking the *Souvenir*; the second count was for a libel in the same magazine, reflecting on the plaintiff personally. Plea, Not Guilty. On the trial before Lord Denman C. J., at the sittings in *Middlesex* after *Michaelmas* term 1835, it appeared that the alleged libels were published in 1834 and 1835. The defendants proposed to shew, in mitigation, that the defendant

In an action of libel the defendant may shew, in mitigation, that he was provoked to issue the libel by publications of the plaintiff reflecting upon him.

Quære, whether the means of proof furnished by stat. 38 G. 3. c. 78. sects. 11 and 17 (and see now stat. 6 & 7 W. 4.

c. 76. s. 8.), as to the publication of newspapers, be applicable to prove such publication by a plaintiff.

A defendant offering such evidence in mitigation must prove that the libel which he complains of came to his knowledge before he libelled the plaintiff.

The mere production from the stamp office of a newspaper deposited there by the plaintiff as publisher, according to stat. 38 G. 3. c. 78. s. 17., does not prove this fact.

Nor is it even to be inferred from the deposit of such newspaper that similar ones were published to the world in general.

If defendant alleges in mitigation that a libellous book was published against him by plaintiff, and, in support of such case, a bookseller produces, from his own possession, a printed book, stating his belief that it is one of a number of copies published at his shop, this is not evidence for the jury that another book with the same contents was actually published.

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Fraser, before publishing the matter now complained of, had on several occasions been libelled by the plaintiff in the *Literary Souvenir*, and in newspapers called the *United Service Gazette* and the *Alfred*; which libels, it was suggested, had provoked those now in question. The reception of such evidence was objected to, but the Lord Chief Justice held it admissible (a). To prove the plaintiff's connection with the *United Service Gazette*, the defendants put in a certified copy of an affidavit filed at the stamp office in 1833 pursuant to stat. 38 G. 3. c. 78., ss. 1, 2. 5. and 9., stating *Watts* to be a proprietor of that paper. They also produced, from the *British Museum*, newspapers which they proved to have been deposited at the stamp office, under sect. 17., and transmitted from thence to the *Museum*, corresponding with the description in the affidavit, and of subsequent dates. Evidence according to the statute was also given as to the *Alfred*; and a witness was called who had printed the copies sent to the stamp-office and now produced, and had signed them with his name, as servant to the plaintiff. It was proved that the plaintiff had read to a witness, as his own, an article in one of the papers which it was now proposed to put in. The defendants' counsel then proposed to read, for the purpose of mitigation, parts of the several papers thus given in evidence; but the reading was objected to, and the Lord Chief Justice held the evidence inadmissible (b). A *Literary Souvenir* for 1832 was also produced for the same purpose; and a witness, in the employ of Messrs. *Long-*

(a) *Watts v. Fraser*, 1 Moo. & Rob. 449.

(b) Copies of another newspaper, the "*Old England*," were tendered and rejected, under similar circumstances; but no further point arose on this part of the case.

mans,

mans, the booksellers, deposed to his belief that this was one of a number of copies published by them for the plaintiff; but he declined to say positively that the individual copy might not have been still in sheets within a week before the trial. This book also was rejected. The libels for which this action was brought did not refer to any of the alleged libels on the defendant *Fraser*. A verdict was found for the defendants on the first count, and for the plaintiff on the second, with 150*l.* damages. *Erle*, in the ensuing term, obtained a rule nisi for a new trial, on account of the rejection of evidence. In this term (*a*),

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Sir *J. Campbell*, Attorney-General, Sir *F. Pollock*, and *Barstow*, shewed cause. The publications complained of by the defendant were no doubt admissible in mitigation, if they had been introduced by regular proof. But evidence like this, of which the pleadings give no notice, ought to be rigidly watched. And the enactments of stat. 38 G. 3. c. 78., relied upon by the defendant, are contrary to the principles of the common law, and should not be extended to any objects or circumstances but the particular ones for which they were designed. Now, the intention of the act was to facilitate proof against printers, publishers, and proprietors, in actions or criminal proceedings; but not to give the same advantage to a defendant seeking to prove publications against the plaintiff, and for a purpose collateral to the main issue, namely, to reduce the damages by shewing provocation. Sect. 9 makes the affidavits sworn at the stamp office (or certified copies)

(*a*) May 29th. Before Lord Denman C. J., Littledale and Patteson Js.

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conclusive evidence against the parties swearing, and *primâ facie* evidence against others named in such affidavits, as to the matters therein set forth, "in all proceedings civil and criminal touching any newspaper or other such paper as aforesaid, which shall be mentioned in such affidavits," "or touching any publication, matter, or thing contained in any such newspaper or other paper." These expressions evidently contemplate proof to be offered by the plaintiff or prosecutor, on the main issue, as against the parties making or named in the affidavit. Then sect. 11 must be read together with the former enactments, and as a continuation of them: indeed, in the later act, 6 & 7 W.4. c. 76., the enactments corresponding with those now in question are embodied in one clause, sect. 8. Stat. 38 G. 3. c. 78. s. 11. enacts that it shall not be necessary, after production of the affidavit or certified copy in evidence against the parties making or named in them, "and after a newspaper, or other such paper as aforesaid, shall be produced in evidence, intituled in the same manner as the newspaper or other paper mentioned in such affidavit," &c., and otherwise corresponding with it, "for the *plaintiff, informant, or prosecutor, or person seeking to recover* any of the penalties given by this act, to prove that the newspaper, or paper to which such trial relates, was purchased at any house, shop, or office, belonging to or occupied by the *defendant or defendants*, or any of them, or by his or their servants," &c. The party producing the newspaper in this case is not a plaintiff, informant, or prosecutor, or person seeking to recover penalties, but a defendant. Sect. 17, though more general, makes no difference on this point. It enacts that one of the newspapers, or other papers,

&c.,

&c., published each day, shall be delivered at the stamp office to the commissioners or their officer, signed by the printer or publisher, and that, "in case any person or persons shall make application to the commissioners, or such officer as aforesaid, in order that such newspaper or other paper, so signed" &c., "may be produced in evidence *in any proceeding civil or criminal*, the said commissioners, or such officers, shall, at the expense of the party applying at any time within two years from the publication thereof," cause the same to be produced in court, or deliver it to the party applying. That clause is not independent of sect. 11. The commissioners are to produce the paper, *valeat quantum*; but its effect, as evidence, must be regulated by the eleventh section; and there have been instances in which a newspaper obtained from the stamp office by the prosecutor or plaintiff has been found to vary from the publisher's affidavit in some of the particulars mentioned in sect. 11, and it has consequently become necessary to prove the publication as at common law (a). If sect. 17 made the paper obtained from the stamp office evidence, merely as coming from that custody, the restrictions in sect. 11 would be idle. It may also be a question whether sect. 17 authenticates, in any degree, papers produced after the lapse of two years.

Assuming it to be proved that any particular paper given in evidence on this trial, as coming from the stamp office, had been printed, and deposited there, by the plaintiff, it does not follow that similar papers were

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(a) The Attorney-General mentioned instances, within his own recollection, on proceedings against the *John Bull* and *Satirist* newspapers. See *Murray v. Souter*, cited in *Cook v. Ward*, 6 Bing. 414. *Rex v. Francys*, 2 A. & E. 49.

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published to the world in general, or that such a paper reached the defendant. Nor was there any evidence to this effect, unless the statute makes the production of a paper from the stamp office, in a case like this, equivalent to such evidence. The defendant undertakes to prove that a paper reflecting upon him was published by the plaintiff, whereby he was provoked to issue the present libel. But the publishing of each newspaper is a separate act; and the defendant should have identified the act which he complains of, by pointing out an individual paper which the plaintiff has published, and by which the defendant has been provoked. The stamp office copy could not have been that paper; and no other is in evidence. The plaintiff has a right to suggest that, after that copy was deposited, a second edition was printed, omitting the libellous matter, and that no copy of the first edition got abroad. The defendant ought to have produced a paper containing the libellous matter, and proved to have reached him; or, at least (if mere probability would suffice), he should have offered evidence rendering it probable that the paper containing such matter came to his hands. As an original, the document could be made admissible by such evidence only; and it could not be treated as a copy unless there had been something in the nature of an original, which was lost, or which the plaintiff had had notice to produce. These observations apply also to the *Literary Souvenir* of 1832: there was no proof that the defendant had seen it; and, to become secondary evidence, it could only be put in as a copy of something which he had seen. The case, in this respect, is like *Nodin v. Murray* (a), where it was proposed to prove, as

(a) 3 Camp. 228.

an original letter, a duplicate taken from the autograph, at one impression, by a copying machine, but Lord *Ellenborough* said that it could be treated only as a copy, and was not admissible without a notice to produce the original written by the party's own hand.

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Erle, *contra*. The doctrine as to evidence in mitigation, which was recognised in this case at *Nisi Prius*, and by *Tindal C. J.* in *Tarpley v. Blabey* (a), though opposed in some degree to the ruling of *Abbott C. J.* in *May v. Brown* (b), is not now disputed on behalf of the plaintiff. [*Lord Denman C. J.* It is not inconsistent with *Lord Tenterden's* opinion in *May v. Brown* (b).] The case in mitigation was made out. The sections referred to of stat. 38 G. 3. c. 78. extend to this case. Sect. 9 applies generally to "all proceedings civil and criminal touching any newspaper or other such paper as aforesaid, which shall be mentioned in any such affidavits," filed at the stamp office. Sect. 11 appears, by its language, to contemplate proof given by a plaintiff or prosecutor only; but there is no ground for supposing that such parties and no others were contemplated; the object is the general furtherance of justice in the case of publications by persons not known. Sect. 17 would alone render the evidence in question admissible. The newspapers produced were proved to be those deposited at the stamp office: in some instances, two years had elapsed from the time of deposit; but the papers do not cease to be evidence at the end of that time, though, perhaps, the obligation on the commissioners to produce them may cease. Then, under this section, it is the

(a) 7 Car. & P. 395. S. C. in Banc. 2 New Ca. 437.

(b) 3 B. & C. 113.

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publisher's duty to deposit at the stamp office a copy of the newspaper issued by him on each day: it is therefore to be presumed that he deposits a copy, and not something different. Considering the purpose of the act, the legislature must be taken to have intended that the copy deposited should be evidence of that which was contained in the other papers of the same title issued on that day by the same party. The delivery by him is an acknowledgment that the copy is (as it ought to be) a paper of the set then publishing. If that be not so, the deposit is to no purpose. [*Patteson J.* The words in sect. 17, "may be produced in evidence in any proceeding civil or criminal," mean proceedings in which the copy may be applied for according to the former provisions of the act; not any proceedings whatever. Lord *Denman C. J.* The clause has reference to a former one, which is more limited. And, supposing that it made the copy evidence for the present purpose, you require the further step, that it makes the copy one of several duplicate originals]. The Court of Exchequer Chamber seem to have considered a newspaper to be so in *Baldwin v. Elphinston (a)*, where they say, "Printing in a newspaper (as laid in the declaration) admits of no doubt upon the face of it. It shall be intended a publication, unless it be shewn that the newspaper so printed by the defendant was suppressed and never published." [*Patteson J.* The Court seem there to have entered into a question of evidence which was not properly before them as a court of error]. As to the cases in which a variance has been found between the newspaper and the publisher's affidavit, and evidence then given as at common law, it is probable that the

(a) 2 W. Bl. 1037.

papers

papers there were produced, under sect. 11, from some other custody than that of the stamp office. At all events, it would not follow from those cases that the papers deposited and the papers circulated are not *prima facie* to be considered as similar. There was, in the present case, parol evidence of an acknowledgment as to part of one of the papers; and others were proved to have been sent to the stamp office by the plaintiff's agent. In *Rex v. Hart* (a) the mere production of a newspaper from the stamp office, corresponding with the affidavit there filed, was held evidence of a publication in the place mentioned in the affidavit. If the kind of proof here tendered was admissible, it could not be necessary to give direct evidence of the paper having come to the defendant's hands; it was sufficient to have shewn that a newspaper, with contents such as the defendant complains of, was circulated in *London*: proof, more or less cogent, might have been given of its having reached him; but the evidence, as it stood, was for the jury. [Patteson J. Is there any presumption that every editor of a periodical work in *London* reads every *London* newspaper? The defendant's publication does not refer to the articles published by the plaintiff.] In *Johnson v. Hudson* (b) the proof that one of the defendants was cognisant of a libel publicly circulated was not conclusive, but it went to the jury. [Lord Denman C. J. The papers there were very carefully traced.] As to the *Literary Souvenir* of 1832, the witness from Messrs. Longmans, had no doubt that it was one of a number

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(a) 10 East, 94.

(b) Tried at the same sittings as the present case. See p. 233, note (b), post.

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of copies published by them; then it was a question of probability for the jury, whether or not a similar copy had found its way to the defendant. It was not necessary to trace an individual copy into his hands.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. In deciding this case, we must look both to the nature of the proposed evidence and to the object with which it is offered. The object is to shew that the defendant was provoked by libels published against him. It is of the essence of such a case that some proof should be given of the libels having come to the defendant's knowledge; if such proof was totally wanting, the defence could not be made available. But the present case hardly came to this point; for I thought that the newspapers could not be received as evidence without proof that some other copy had been issued than that deposited at the stamp office, with which it appeared that the defendant could not have been acquainted. And no evidence was given of any duplicate having been published. Then a question is raised, whether or not, in the absence of direct proof, it can be inferred from the printing of one newspaper, which was not circulated, that another exactly corresponding with it was printed, which might meet the defendant's eye. The same question arises as to the book which was offered in evidence. We think that the inference cannot be drawn, and that some evidence should have been given of the publications having actually come abroad. We are not warranted in presuming that the usual numbers of a publication were in fact issued in any particular

ticular instance. One authority, *Baldwin v. Elphinstone* (a), was cited, where the Court of Exchequer Chamber held that printing must, *primâ facie*, be understood to be a publishing, because the matter must be delivered to a compositor and other workmen: but it does not follow, as of course, from a work being printed, that the party sending it forth employed a compositor or other workmen. We cannot, therefore, act upon that case. The rule must be discharged.

Rule discharged (b).

(a) 2 W. BL 1037.

(b) JOHNSON *against* HUDSON and MORGAN.

CASE for publishing a libel upon the plaintiff. *Morgan* suffered judgment by default; *Hudson* pleaded Not Guilty. On the trial before Lord Denman C. J., at the *Middlesex* sittings after *Michaelmas* term, 1835, it appeared that the alleged libel had been published by being sung in the streets; that *Morgan* had printed 1000 copies of a song, of which 300 had been delivered at *Hudson's* shop; that the song complained of had been sung from a printed paper received of *Hudson*, and taken, at *Hudson's* shop, from a parcel containing about 300; and that it had since been destroyed; but the person who sang it swore that it corresponded with a printed song which was produced, and which had *Morgan's* name on it, as printer; and one of *Morgan's* journeymen swore that the printed song produced corresponded with that which *Morgan* had printed and delivered to *Hudson*. The counsel for *Hudson* contended that he was entitled to a nonsuit, as the proof failed to connect *Morgan* with the publication, and as the complaint against *Hudson* was of a joint publication only. The Lord Chief Justice left it to the jury to say whether there was a joint publication, reserving leave to move to enter a nonsuit. Verdict for the plaintiff.

Kelly now moved according to the leave reserved. There was no evidence that *Morgan* was in any way connected with the libel. [Lord Denman C. J. Suppose *Morgan* had pleaded Not Guilty, as well as *Hudson*, and there had been evidence of a publication by *Hudson* only, must not there have been a verdict against *Hudson*?] *Morgan* has

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Thursday,
January 14th,
1836.

In an action against *A.* for publishing a libel, evidence sufficient to go to a jury is furnished by proof that a libel was actually published; that it was a printed paper, since destroyed; that it corresponded with a printed paper produced; and that *A.* printed a paper corresponding with that produced, and sent 300 to a shop from whence a person actually publishing the libel procured it; and that the libel was, on that occasion, taken from a parcel apparently containing 300.

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suffered judgment by default, and cannot, therefore, have a verdict; the damages, therefore, must be jointly assessed; but that can be done only upon proof of a joint tort. [Lord Denman C. J. We will not refuse the rule on the ground now suggested; but it seems to me to present a very great difficulty]. Then the present question may be considered simply as if *Morgan* alone had been sued, and had pleaded Not Guilty. The general rule is, that the identical libel published must be produced, except where it is lost. Now here the actual libel published was destroyed; but then the secondary evidence must in some way connect *Morgan* with the paper destroyed. It is not sufficient for a witness to swear that it was like some other paper with which *Morgan* was connected. Had such evidence been sufficient to prove a publication, many of the provisions of the statute 38 G. 3. c. 78. would have been unnecessary. Sect. 11 would be superfluous, if the evidence now objected to were sufficient. This objection applies to two steps of the proof.

LITLEDALE J. The paper from which the actual publication was made being lost, the plaintiff was to give secondary evidence. Another paper is produced, and the journeyman swears that *Morgan* printed papers similar to it; and then evidence is given of the correspondence of the paper produced with that which is lost. I think that is sufficient.

WILLIAMS J. I think there was sufficient secondary evidence to go to a jury of *Morgan's* having printed the paper from which the publication took place.

COLERIDGE J. I am of the same opinion. The question relates to the copy which was sung. That copy was printed by *Morgan*, if it formed part of the 1000 copies which *Morgan* was proved to have printed, and of which 300 were proved to have been delivered to *Hudson*. Now the copy from which the song was sung came from *Hudson's* shop. Can it be said that, on all the facts, there was not evidence for a jury? There is no rule, respecting the proof of identity, peculiar to the case of a printed paper; the evidence may depend upon correspondence in size, appearance, and other circumstances.

LORD DENMAN C. J. It was sworn that the particular paper from which the song was sung had been destroyed; and that let in the secondary evidence. The witness who had actually sung the song swore that the paper destroyed was an exact copy of the paper produced. The question then was, whether it was one of the parcel taken to *Hudson's* shop from *Morgan*. That was shewn, from the correspondence of the paper produced with those printed by *Morgan* in name, appearance and contents, by the evidence of the journeyman. If we drop the recollection that this was
a printed

a printed paper, and examine the question of its identity as we should a question of the identity of a bale of goods, it is clearly impossible to say that there is not some evidence. Then there is also evidence that *Hudson* and *Morgan* dealt together, and that their dealings comprehended the printing by *Morgan* of some paper which was published by *Hudson*.

Rule refused.

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DOE on the several Demises of THOMAS DANIEL, SHERIFF, and AFFLECK, against COULTHRED and BALDREY. Saturday,
June 10th.

EJECTMENT for lands in *Suffolk*. On the trial before *Bolland B.*, at the *Suffolk* Summer assizes 1835, the plaintiff relied upon the demise of *Sheriff* only, who was shewn to be heir at law of *Edmund Affleck*, the surviving trustee named in the will of one *William Daniel*, deceased.

In ejectment on the demise of *S.*, evidence is admissible to shew that a deceased party, being then in receipt of the rents, executed a deed, charging the land with an annuity, in which he stated *S.* to be legal owner of the fee, and himself to hold, for the term of his natural life, by permission of *S.*

William Daniel, after disposing by the will of certain lands in *Essex*, devised to the trustees the residue of his freehold messuages, lands, and hereditaments, in *Suffolk*, to and to the use of the trustees in fee, on trust that they, or the survivor, or the heirs of such survivor, should with all convenient speed sell the same, and apply the money arising from the sale to the payment of debts, funeral expenses, and legacies, and lay out the residue in the purchase of freehold messuages, lands, tenements, and hereditaments, in *Essex*, and settle and convey the same to such uses and estates, &c., as were previously devised and limited concerning the landed property in *Essex* before mentioned. The *Essex* property thus referred to was devised to trustees in fee, habendum to them in fee, to the use of *William Barker Daniel* for life; remainder (after certain intermediate limitations

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limitations of estates tail which failed for want of issue) to the use of *Thomas Daniel* in fee. *W. Daniel*, the testator, died in 1791.

To shew that *Sheriff* was legal owner of the lands which were the subject of the present action, it was proved that *W. B. Daniel*, for many years before and after the year 1813, was in the receipt of the rents. The plaintiff then offered in evidence an indenture of 1st October 1813, executed by *W. B. Daniel*, and made between him of the first part, *John Watier* of the second part, and *James Christie* of the third part; wherein, after reciting the will of *William Daniel* respecting the lands thereafter mentioned, and that the debts and legacies were duly paid, it was witnessed that *W. B. Daniel*, for securing an annuity by him granted to *John Watier*, party to the indenture, did grant, bargain, sell, and demise, to *James Christie* (as trustee for *Watier*), among other parcels, eight acres of land, &c., then in the occupation of *John Baker* as tenant thereof to *W. B. Daniel*; which land, the deed stated, "was part and parcel of the freehold estate late of the said *William Daniel*, as was by his said will directed to be sold, and held by the said *W. B. Daniel* for the term of his natural life, with the concurrence of" the trustees, "or the survivor of them, or the heirs of such survivor, without proceeding to any such sale." It was proved that the land conveyed by this indenture was the land which was the subject of the present action (a); and that *W. B. Daniel* died in 1832. The defendants' counsel ob-

(a) Some question arose whether the defendants, on the evidence, were not shewn to have come into possession through *W. B. Daniel*; but the argument ultimately rested only on the facts mentioned in the text. See the judgment.

jected

jected to the receipt of this indenture as evidence; but the learned Judge admitted it, reserving leave to the defendants to move for a nonsuit. Verdict for the plaintiff. In *Michaelmas* term 1835, *Storks* Serjt. obtained a rule for a nonsuit. On a former day in this term (a),

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Kelly shewed cause. *W. B. Daniel*, having been shewn to be in receipt of the rents and profits, would appear *primâ facie* to be tenant in fee. According to his statement in the deed, he was, at law, merely tenant at will to the trustees, and had only an equitable life estate. The evidence tendered is, therefore, that of a declaration by a deceased party, made while in possession, to cut down his own interest; and such evidence is constantly held admissible. The case falls within the principle of *Holloway v. Rakes* (b), *Doe dem. Foster v. Williams* (c), *Davies v. Pierce* (d), *Peaceable dem. Uncle v. Watson* (e), *Carne v. Nicoll* (g), and *Doe dem. Human v. Pettett* (h). [Lord Denman C. J. referred to *Woolway v. Rowe* (i).]

Storks Serjt. and *Gunning*, contra. It does not appear that *W. B. Daniel* had any interest under the will; for no evidence was given of the payment of debts, and the existence of a surplus. His possession is, in fact, in contravention of the trusts in the will. In *Doe dem. Human v. Pettett* (h) Abbott C. J. seems to put the decision on the particular circumstances of that case; and his language there shews that there is no stringent

(a) May 29th. Before Lord Denman C. J., *Littledale and Patteson* Js.

(b) Cited by Buller J. in *Davies v. Pierce*, 2 T. R. 55.

(c) 2 Cowp. 621.

(d) 2 T. R. 53.

(e) 4 Taunt. 16.

(g) 1 New Ca. 430.

(h) 5 B. & Ald. 223.

(i) 1 A. & E. 114.

rule

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rule to the extent contended for on the other side. If the land mentioned in the annuity deed be not the land mentioned in the devise, the evidence is inadmissible; if it be, the declaration is in favour of *W. B. Daniel*, and not against him, for he claims a right to charge it with the annuity, which, under the devise, he could not do without a breach of the trust. In *Doe dem. Human v. Pettett* (a) the declaration was strongly against the party making it. In *Outram v. Morewood* (b) it was held that declarations by a deceased owner, of receipts of rent, could not affect third parties. In *Woolway v. Rowe* (c) the interest of the party who made the declaration was, at that time, the same as the interest of the party, against whom the declaration was proved, at the time of the trial: that is not the case here.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

The plaintiff's title was derived from the surviving trustee under the will of *W. Daniel*, empowering them to sell the premises sought by this ejectment, and to purchase, with the price, other lands which were to be settled on his son *W. B. Daniel* for life, with remainders over. The trustees never sold.

Baldrey, one of the defendants, succeeded his father, who had paid rent as tenant for some years to *W. B. Daniel* for many years before. The defendant first named came in as landlord.

A rule nisi for a nonsuit was granted, on the question whether certain evidence was admissible;

(a) 5 B. & Ald. 223. (b) 5 T. R. 121. (c) 1 A. & E. 114.

namely,

namely, a deed executed by *W. B. Daniel* for raising a sum of money, to be secured by annuity on these premises, in which the will was recited; that the trustees had not sold; that *W. B. Daniel* was in possession by permission of the trustees.

The learned Judge admitted the evidence: we think he was right, on the principle that, *W. B. Daniel* being once shewn to be in receipt of the rents and profits, his declaration in the deed that he held under and by the permission of the lessor of the plaintiff's ancestor was in derogation of his own apparent right to be considered as the owner in fee. We cannot look at the equitable relation in which the parties stood to each other. The sole question is, in whom the legal estate resides. We think the admission of the person in receipt of the rent that he held under another, whether as tenant by sufferance, or as receiver of the rents, is undoubtedly evidence that he himself is not the owner of the legal estate. Then there is proof here, aliundè, that the lessor of the plaintiff had the legal estate under *W. B. Daniel's* will; and it is also proved that the father of the defendant was in possession in the lifetime of the testator.

Rule discharged.

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Saturday,
June 10th.

DOE on the joint and several Demises of Sir RICHARD BASSETT, Knight, and Others, against ANNA MEW.

DOE on the several Demises of EDWARDS, JELLY, ROBERT TUCKER, and Others, against GUNNING and Another.

To prove the title of a lessor of the plaintiff in ejectment, claiming as executor, it is sufficient (without laying ground for reception of secondary evidence) to produce minutes of the proof of the will and sealing of probate, indorsed on the will by the surrogate and registrar of the ecclesiastical court; it being proved also that, by the practice of the particular court, no other record of such grants is kept.

An exemplification of letters of administration de bonis non, reciting the former grant of administration, requires to be stamped only as an exemplification of a single proceeding, under stat. 55 G. 3. c. 184. Sched. Part II. tit. ii. *Proceedings in the Ecclesiastical Courts.*

On motion in arrest of judgment, a declaration in ejectment, stating the county in which the lands lay, but giving no further local description, was held sufficient.

THE first of these actions was an ejectment for lands in the borough of *Newport, Isle of Wight*. On the trial before *Littledaie J.*, at the *Winchester Spring* assizes, 1836, it appeared that *Wood*, one of the lessors of the plaintiff, claimed as executor of *William Rayner*, in whom an outstanding term was vested. As evidence of the granting of probate to *Wood*, the plaintiff's counsel produced the will from the registrar's office of the diocese of *Winchester*, with the following minute at the foot, signed by the surrogate.

"The 19th day of *September*, 1823. *Martha Rayner*, *William Wood*, and *Francis Worsley*, the above-named executors, were duly sworn well and faithfully to administer the goods, chattels, and credits of the above-named *William Rayner*, the testator, deceased. And they further made oath that all the goods, chattels, and credits of the said testator, at the time of his death, did not amount in value to 1000*l.* And they lastly made oath that the contents of the paper writing hereunto annexed, and to which they have severally subscribed their names, are true. Before me, *G. Richards*, Surrogate."

To

To which was subjoined the following memorandum, signed with the initials of the deputy registrar.

“ 23 Sept. 1823. Probate passed the seal to *Serle*.
“ C. W.”

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Mr. *Woolrych*, the deputy registrar, was examined, and stated the practice in the diocese of *Winchester* to be that, after the jurat (as above set out) was signed by the surrogate, which was done at the time of proving the will, a copy of the will was engrossed on parchment, and the seal affixed by the deputy registrar; that the sealed copy was the probate; that the signature of the surrogate to the jurat was the authority for sealing; that the memorandum by the deputy registrar was never made till after the probate was sealed; and that there was no other record or entry of the granting of probate than the minute subscribed by the surrogate. *Serle* was a proctor. The probate itself was not produced; nor was any ground laid for the reception of secondary evidence. This evidence of the granting of probate was objected to on behalf of the defendant. *Littledale J.* held it admissible, but reserved the point. A verdict was found for the plaintiff; and, in *Easter* term 1836, a rule nisi was obtained for entering a nonsuit, on the grounds that the above evidence ought not to have been received, and that, if so, no case was made out on the demise of *Wood*. In the present term (a),

Erle shewed cause. The surrogate's minute and the memorandum were good primary evidence of probate granted. There is no record of that fact but the writing

(a) June 2d. Before Lord Denman C. J., *Littledale*, *Patteson*, and *William J.*

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against
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on the will itself, which is the very act of the Ecclesiastical Court. It has been held that the grant of letters of administration was sufficiently proved by the book of acts, or a copy from the act in the registry of the book of the Ecclesiastical Court, though no search had been made for the letters of administration themselves, or notice given to produce them; *Elden v. Keddell* (a), *Davis v. Williams* (b). So, in the case of executors, the probate act-book from Doctors' Commons, containing an entry that the will was proved and probate granted, was held proper evidence of those facts, though the probate was not produced, nor its non-production accounted for; *Cox v. Allingham* (c). It is not necessary that the act of the Court should be entered in a book. Where the practice is for the surrogate to make his minute on the will itself, that is the original evidence, and the probate itself is secondary. The Court then called upon

Butt, contra. The surrogate's entry in this case was not a minute of any judgment or order of the Court, and did not even embody any direction; therefore the first two cases cited, assuming them to have been rightly determined, are not in point. Lord *Ellenborough's* observation in *Elden v. Keddell* (a), that the book of acts there "was the authority for the proper officer afterwards to make out the letters of administration," cannot apply to this document, which is merely the surrogate's memorandum that the parties named have made certain depositions, and been sworn duly to administer. In all the

(a) 8 *East*, 187.(b) 13 *East*, 232.(c) *Jac. Rep.* 514.

cases referred to, the document admitted is spoken of as the book of acts of the Court, and appears to have had that character. The jurat here has neither the form nor the substantial effect of such a book. The memorandum by the deputy registrar, made after the probate has been sealed, is still less like the entry of a judicial act. *Davis v. Williams* (a) was an action of assumpsit against an administratrix; and slight evidence might be sufficient to fix that character upon her for the purposes of the action. [The Court deferred giving judgment in this case till after the argument in *Doe dem. Edwards v. Gunning*.]

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Cur. adv. vult.

Doe dem. Edwards v. Gunning was an action of ejectment for lands, &c., in *Somersetshire*. The demises were stated in the declaration to have been made in the county of *Somerset*, of land, &c., "situate in the county aforesaid," without further local description. On the trial before *Bolland B.*, at the *Taunton* Spring assizes, 1836, the plaintiff, on one of the demises, derived title from *John Padfield*, as executor of *Grace Green*. To shew that probate had been granted to *Padfield*, the plaintiff's counsel put in the original will of *Grace Green* (produced by an officer of the Ecclesiastical Court of *Wells*) having this indorsement.

"Proved, &c., 5th August 1814, before the worshipful *John Turner*, clerk, M.A., Surrogate, &c., by the oath of *John Padfield*, the sole executor within named.

"Effects under 2000*l.*

"Sealed."

(a) 13 *East*, 232.

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The witness stated that the practice in the diocese was to engross the grant of probate on the will, that there was no other act of granting probate, and that no book was kept, or other entry made of such grants. And he said that, seeing this memorandum in the handwriting of the deputy registrar (who was now dead), he had no doubt that the probate had passed the seal. The probate was not produced, nor any ground laid for admitting secondary evidence. The mode of proof was objected to, but the learned Judge admitted the evidence, reserving the point (a).

It likewise became necessary, under another demise, by *Robert Tucker*, to shew that *Robert* had taken out administration of the goods of *John Tucker*, not administered by his widow *Sarah Tucker*, who had been administratrix thereof with the will annexed. For this purpose the plaintiff's counsel produced an exemplification of the letters of administration granted to *Robert*, reciting the prior grant of administration to *Sarah* (b).

(a) The same point was reserved as to probate of the will of *John Padfield*, the indorsement on which was as follows. "Proved, &c., 22d October 1830, by the oath of *James Burfitt Edwards*, the executor within named; a power being reserved for *Sarah Burfitt Edwards* and *Hannah Burfitt Edwards*, spinsters, minors, and the executrixes within named, to prove, &c., when they shall respectively arrive to a competent age and lawfully require the same.

"Effects under 2000L.

"Sealed."

The circumstances, in other respects, were the same as those stated in the text as to *Grace Green's* will.

(b) The exemplification was given under the seal of the Prerogative Court of *Canterbury*, and began by stating that it was found, on searching the registry, that, on &c., administration, with the will annexed, of the goods of *John Tucker* was granted to *Sarah* his widow: it then further made known that, on &c., administration, with the will annexed, of the said *J. T.* &c. (stating the grant to *Robert Tucker* of administration de bonis non); and it then set out the will.

It

It bore a single 3*l*. stamp. The defendant's counsel referred to the Stamp Act, 55 G. 3. c. 184. Sched. Part II. tit. ii., "Proceedings in the Ecclesiastical Courts," &c., which imposes a duty of 3*l*. on the "exemplification under the seal of any of the said courts of any record or proceeding therein;" and they contended that the document now put in was an exemplification of the records of two proceedings, and ought, therefore, to have had two 3*l*. stamps. The learned Judge reserved this point also, admitting the evidence. A verdict was given for the plaintiff; and, in *Easter* term 1836, *Barstow* obtained a rule to shew cause why a nonsuit should not be entered, or the verdict restricted to the demise of *Jelly*, and a verdict entered for the defendants on the other demises; or why the judgment should not be arrested, on the ground that no sufficient local description of the premises was given in the declaration. In this term (*a*),

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Erle and *Fitzherbert* shewed cause. As to the first point, it was only necessary to shew that the Judge of the Ecclesiastical Court had pronounced the deposition before him sufficient, in a matter over which his court had exclusive jurisdiction. The sealed probate is only an authentication of the judgment, given to furnish the executor with a medium of proof. The judgment itself is to be looked for elsewhere; and the mode of recording and preserving that is a matter of practice, depending on the rules of each particular court. *Cox v. Allingham* (*b*) (followed up by the ruling of *Littledale J.* in *Doe dem. Bassett v. Mew*) is decisive against the

(*a*) June 3d. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Williams J.*s.

(*b*) *Jac. Rep.* 514.

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 ———
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present objection. *Broughton v. Dyson* (a) also shews the admissibility of the kind of evidence now in question. [*Littledale J.* There it was offered only as secondary.] Where the probate has been lost, an exemplification of it has been held to be good evidence (b). If so, that from which the exemplification is taken must also be good. As to the second point; the document produced was the exemplification of a record or proceeding in the Ecclesiastical Court, and not of two. It set forth all that was done in the matter of the will of *John Tucker*. The administration upon which the plaintiff's case turned was of the goods of *John* not administered by *Sarah*. The plaintiff does not derive any title from *Sarah*; the step, that administration was taken out by her, is not material to his case; but the forms of the Ecclesiastical Court require that such previous grant of administration should appear as a part of the narrative of proceedings. A stamp is not necessary for each individual fact of that narrative. The whole forms one connected record. As to the last objection, that the premises are stated to be in *Somersetshire*, but no parish or vill is named, — the omission of these is aided after verdict; and it may be questioned whether the insertion of them be at all necessary. In *Doe dem. Rogers v. Bath* (c), which was cited in moving for the rule, no local description was given; the only mention even of a county being the statement of venue in the margin (d). Here a county is given; the sheriff,
 in

(a) 1 Brod. & B. 219. S. C., as *Gorton v. Dyson*, 3 B. Moore, 558.

(b) *Shepherd v. Shorthose*, 1 Stra. 412. (c) 2 Nev. & M. 440.

(d) In *Doe on the several Demises of Rogers and Others v. Bath, Cole-ridge Serjt.* in Easter term, 1833, obtained a rule nisi for arresting judgment (after verdict for the plaintiff at the last *Cornwall* assizes), on the ground that the declaration gave no sufficient local description of the premises. It began: — “*Cornwall* to wit,” and recited that, “Whereas
Melchisedec

in executing a writ of possession, can have no doubt that some premises in his bailiwick are to be recovered. And this Court, in the case cited, did not pronounce any positive judgment, but gave leave to amend. In *Cottingham v. King* (a) the premises were described (in a declaration in ejectment) as situate "in all those the lordships, manors, and late dissolved abbey or monastery of *Boyle* and *Insemacranaw*, and quarter of land of *Tallagh*, with the town and tenement of *Boyle*, and fairs and markets thereunto belonging, in the county of *Roscommon*;" and, on error brought, the declaration was objected to because no vill was named; and this Court gave judgment for

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Melchisedec Rogers, on " &c., " at the parish of *Davidstowe*, in the county of *Cornwall*, had demised six acres of arable land," &c., " with the appurtenances, to the said *John Doe*, to have " &c. Two other demises were recited in the same manner; and the declaration then stated, as usual, the entry of *John Doe*, and the entry upon him by the defendant, &c., without any indication, by reference or otherwise, of the local situation of the premises. In the same term *Erle* obtained a rule, calling upon the lessors of the plaintiff to shew cause why the issue and nisi prius record should not " be amended by inserting the situation of the premises as described in the declaration;" this rule, and the rule for arresting judgment, to come on for discussion at the same time. It appeared, by the affidavit in support of the rule last obtained, that the declaration, as it originally stood in the issue delivered to the defendant's agent, stated the premises to be situate in the parish &c., and county &c., in the usual manner, but that the declaration had been amended by adding a demise, and afterwards appeared in its present form. A proper local description was also given by the consent rule, which was annexed to the present affidavit. In *Michaelmas* term, 1833 (*November 22d*), *Erle* shewed cause against the rule for arresting judgment, and urged that, if the alleged defect were fatal (which he denied), the plaintiff should be permitted to amend. The defendant's counsel were absent. The Court (*Denman C. J.*, *Parke*, *Taunton*, and *Patteson Js.*) gave leave to amend, on payment of costs. The rule was, " That the lessors of the plaintiff be at liberty to amend the issue and Nisi Prius record by inserting the situation of the premises as described in the declaration, on payment of costs, including the costs of the application to arrest the judgment."

(a) 1 Burr. 623.

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the plaintiff. In *Rich v. Shere* (a), there cited, where judgment was reversed in the Exchequer Chamber, because the declaration in ejectment did not shew in what "town, parish, hamlet, or place" the land lay, the ground stated is that a proper vicinage was not shewn from which the jury should come; and probably the same argument prevailed in *Gray v. Chapman* (b); but that reason no longer holds, since juries have been summoned from the body of the county; *Ware v. Baydell* (c). In *Goodtitle, Lessee of Bremridge, v. Walter* (d) the declaration was for lands in the parish of *West Putworth* and *Bradworthy*. It appeared in evidence that there was no such parish, but that the lands lay partly in a parish called *West Putworth*, and partly in a parish called *Bradworthy*; and the Court of Common Pleas held (on motion for a new trial) that the word "parish" might be treated as surplusage, and that the plaintiff might recover all the lands. In such a case, the statement in the declaration could be no guide to the sheriff; and in ejectment, as in other personal actions, the plaintiff must point out, at his peril, to the sheriff the specific matter to be recovered. Nor is it to be assumed that, in ejectment, the judgment cannot be good unless an effectual writ of possession can be grounded upon it; for it was not always the practice to issue writs of possession on such judgments; and, as late as 14 H. 7., error was brought because the judgment, in ejectment, was, that the plaintiff recover his term (e). The term may have expired before judgment; and then the writ of possession would be inapplicable.

(a) *Hob.* 89. (5th ed.)(b) *Cro. Eliz.* 822.(c) 3 *M. & S.* 148.(d) 4 *Taunt.* 671.(e) See the authorities collected, 1 *A. & E.* 756. note (a), to *Doe dem. Poole v. Errington*.

Barstow,

Barstow, *contra*. First, an endeavour is made here to support a title, as executor, by production of a memorandum written at a time not ascertained, and without seal or signature. The probate is not produced or accounted for; and the memorandum is relied upon as primary evidence. It may be necessary to review the decision of Sir *Thomas Plumer* M. R. in *Cox v. Allingham* (a). The case of an executor (then before the Master of the Rolls) is different from that of an administrator: the latter character is conferred by the ordinary at his discretion, and may be granted by a mere entry in the registry-book, and without seal, though not by parol merely; *Toller on Executors*, p. 119. book I. c. iii. s. 8. (b): but the executor's authority is derived from the will. "When the will is proved, the original is deposited in the registry of the ordinary or metropolitan, and a copy thereof in parchment is made out under his seal, and delivered to the executor, together with a certificate of its having been proved before him; and such copy and certificate are usually styled the probate;" *Toller*, p. 58. b. I. c. ii. s. 5. "The probate thus passed, although it does not confer, yet authenticates the right of the executor, for courts of law or equity take no judicial notice of any executor until he has proved the will;" and, "so long as the probate remains unrevoked, the seal of the ordinary cannot be contradicted," though it may be admitted and avoided, as by shewing forgery. *Toller*, p. 74, 75, b. I. c. ii. s. 10. In the case of an executor, therefore, the probate is the primary evidence; and, until the means of access to it are exhausted, no other can be received.

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(a) *Jac. Rep.* 514.

(b) 7th ed.

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Elden v. Keddel (a), and *Davis v. Williams* (b), where the book of acts and a copy from the act in the registry were admitted as evidence, were cases of administration. In no instance but in the case of *Cox v. Allingham* (c) has any document but the probate been considered primary evidence of an executor's title; and there an official book, "the probate act-book," was produced; which distinguishes that case from the present. The Master of the Rolls, in his judgment there, says, "It is only the act of the Ecclesiastical Court that is to be proved. Now we have here the original book containing the entry of the act of the Court. The probate is only a copy of this act: this is the original, and, therefore, the primary evidence. But even an examined copy of the probate would be evidence of the person being executor. I observe, that it is so laid down in Mr. *Phillips's* book (d), and in *Hoe v. Nelthrope* (e) and in *King v. Haines* (g), before Lord *Holt*, and this without proving that the probate itself is lost." In the page referred to, of Mr. *Phillips's* work, is a passage which may, perhaps, have misled the Master of the Rolls. "And though the original will, together with the probate, is produced by the officer of the Ecclesiastical Court, the will cannot be read in evidence, unless it bears the seal of the Court, or some other mark of authentication." But in *Rex v. Barnes* (h), there referred to, the probate itself was used to prove that the executors were entitled to that character; and then the will was offered to

(a) 8 *East*, 187.(b) 19 *East*, 232.(c) *Jac. Rep.* 514.

(d) Vol. ii. p. 645. 8th ed. The report cites "p. 317. 3d edition."

(e) 3 *Salk.* 154. *S. C.* 1 *Ld. Raym.* 154.(g) *Rex v. Haines, Skinn.* 584.(h) 1 *Stark. N. P. C.* 243.

establish

establish some other point; and, for that purpose, *Le Blanc J.* would not admit it without authentication. In *Hoe v. Nelthrope* (a) the copy of a probate is said by Lord *Holt* to be evidence, because "the probate is an original taken by authority, and of a public nature:" and in *Rex v. Haines* (b) Lord *Holt* says, that "a copy of a probate of a will, where the Court has jurisdiction, is good, because the probate itself in such case is an original act of the Court." In *Shepherd v. Short-hose* (c) the probate is clearly treated as an original act of the Court. In *Noell v. Wells* (d), where, on plea of ne unques executrix, a probate was produced at the trial, the ordinary's seal was held by this Court to be conclusive of the genuineness of the will, unless it could be shewn that the seal was forged or repealed, or that there were bona notabilia: and this case was cited with approbation by *Buller J.* in *Allen v. Dundas* (e), where the Court in like manner recognised the binding effect of the ordinary's seal, and the authority of the probate as a judicial act. Lord *Hardwicke* says, in *Kempton dem. Boyfield v. Cross* (g), as to letters of administration, "The granting administration is the act of the Ecclesiastical Court, who are the proper judges. The proof of that act is by the commission itself, which can only be denied by denying the seal, or by a copy of the act of Court, or by an exemplification thereof." The distinction now contended for, between the case of an executor and that of an administrator, does not appear to have been considered in *Cox v. Allingham* (h).

As to the second objection; the exemplification con-

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(a) 3 Salk. 154. S. C. 1 Ld. Raym. 154.

(b) Skinn. 584.

(c) 1 Stra. 412.

(d) 1 Lev. 235.

(e) 3 T. R. 131.

(g) Cases K. B. temp. Hardwicke, 108, 109.

(h) Jac. Rep. 514.

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tained the proceedings which took place at one time as to the administration with the will annexed, granted to *Sarah Tucker*, and, at another, as to the administration de bonis non, granted to *Robert Tucker*. The exemplification, therefore, was of two distinct proceedings within the Stamp Act. Putting them on one parchment could not alter their nature.

Lastly; there is no authority for saying that lands are sufficiently described in a declaration in ejectment by stating them to lie in a particular county, without any further local description. Although the recovery in ejectment may not always have been by writ of possession, that writ is now an essential part of the proceeding. *Doe dem. Rogers v. Bath* (a) was not an actual decision; but the Court were so pressed with the objection that they gave leave to amend on payment of costs. In *Cottingham v. King* (b) the principle that there must be some further local description than the name of the county appears to be conceded. In *Goodtitle dem. Pinsent v. Lammiman* (c), and *Doe dem. Marriott v. Edwards* (d), where the situation of lands was misdescribed in respect of the parish, the variance was held fatal. In *Goodtitle, Lessee of Bremridge, v. Walter* (e), the declaration described the lands as situate in the "parish" of *W. P.* and *B.*; there was a parish of *W. P.* and a parish of *B.*; and part of the lands lay in each. That case does not support the generality of description attempted here.

Cur. adv. vult.

(a) 2 *Nev. & M.* 440. See p. 246. note (d), *antè*.

(b) 1 *Burr.* 623.

(d) 1 *Moo. & R.* 319.

(c) 2 *Camp.* 274.

(e) 4 *Taunt.* 671.

Lord

Lord DENMAN C. J. now delivered the judgment of the Court.

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DOE dem. BASSETT *against* MEW.

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BASSETT
against
MEW.

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The sole question in this case arose on the proof of probate of a will. The will was produced from the registrar's office with a memorandum at the foot of it, signed by the surrogate, that the executor had proved the will, and (a) that the probate had been sealed. It was sworn that such memorandum was never made till probate had been granted by the Court. Evidence substantially the same was held to be sufficient by the Master of the Rolls in *Cox v. Allingham* (b), cited at the bar, in accordance with earlier decisions in this Court, though not absolutely flowing from them. We are of opinion that these authorities ought not to be disturbed, and that the rule for a new trial must be discharged.

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The same point arose here also.

There was a further objection: the want of a proper stamp for the exemplification; which ought to be 3*l.* for each will. It was said that the exemplification set forth the wills of two persons, and the stamp ought, therefore, to have been doubled. But this was merely accidental; the one title appearing merely as identifying the party on whom the other was conferred. This objection therefore appears untenable.

A rule was also applied for to arrest the judgment for want of a parish or vill appearing in the declaration. We think this immaterial, the county being mentioned.

Rule discharged.

(a) See p. 241.

(b) *Jac. Rep.* 514.

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Saturday,
June 10th.

The KING *against* The Rector and Church-
wardens of BIRMINGHAM.

One of two candidates for the office of churchwarden was elected at a vestry, and subscribed the declaration of office, but the election was alleged to have been so improperly conducted that the proceedings were void. To give the parties impugning the election an opportunity of trying its validity, the Court (considering a *prima facie* case to be presented) granted a mandamus, calling on the rector and churchwardens to convene a vestry for electing a churchwarden for the remainder of the year.

At an election in vestry, where the right of voting is regulated by

Sturges Bourne's Act, 58 G. 3. c. 69. s. 3., it is no objection to the proceedings

that the chairman directed a poll without first taking a shew of hands: although a shew of hands was demanded, and the poll was not demanded, but was objected to. Per Lord Denman C. J. and Littledale J.

A RULE was obtained in this term, calling upon the rector and churchwardens of the parish of *Birmingham* to shew cause why a mandamus should not issue commanding them, or such of them to whom the same should of right belong, to convene a meeting in vestry of the inhabitants for the election of a churchwarden of the said parish for the remainder of the present year; cause to be shewn on notice of the rule given to the rector, and to the churchwardens and overseers, or some of them, and to *James Brown*. It appeared, by the affidavits in support of the rule, that, on *Easter Monday* last, the rector and parishioners met in vestry, according to custom, to elect two churchwardens. The rector took the chair, and, as he was entitled to do, nominated one churchwarden. Two other persons were then proposed and seconded as candidates for the remaining office of churchwarden, which was in the appointment of the parishioners; and the rector was called upon (in pursuance of an alleged custom) to take a shew of hands upon the question which candidate should be appointed. He refused, assigning, as a reason, that the provisions of stat. 58 G. 3. c. 69. applied to this election, and were inconsistent with the proceeding by shew of hands; and he gave directions for a poll, which was forthwith taken, although, as these

affidavits

affidavits stated, no parishioner present demanded a poll, and several remonstrated against it. Votes were given for both candidates; and the result of the poll was declared to be in favour of *James Brown*. The affidavits went into a detail of circumstances to shew that the poll had been improperly closed; and that, in other respects, it had been so unfairly conducted as to render the election void. By the affidavits in opposition to the rule, it was denied that any custom of taking a shew of hands existed (a), although such a practice had prevailed from the year 1831; and the rector stated that he had directed a poll at once, to avoid confusion, and because, on a shew of hands, it could not be known what voters were entitled to give one or more votes under the statute. *Brown* subscribed the declaration of office as churchwarden at the usual time.

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Sir *J. Campbell*, Attorney-General, Sir *W. W. Follett*, and *Humfrey*, now shewed cause. A mandamus to elect cannot be the proper course here, because the office is full de facto; *Rex v. The Mayor, &c. of Oxford* (b), *Rex v. The Mayor, &c. of Winchester* (c). [*Patteson J.* That objection applies where a remedy is open by quo warranto]. If it is not so here, it is because the right to the office of churchwarden is a matter of ecclesiastical cognizance, and to be tried as such; the present motion is, in fact, an attempt to try it by means of a mandamus. [*Littledale J.* The reason given in *Rex v. Shepherd* (d) for refusing a quo warranto to try the validity of a churchwarden's election was, that claiming such an office was not an usurpation on the rights of

(a) The alleged custom was given up on the argument.

(b) 6 A. & E. 349.

(c) Antè, 215.

(d) 4 T. R. 381.

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the Crown]. The unsuccessful candidate here should have applied for a mandamus to swear him in, if he could have laid grounds for such a claim. That was the course pursued in *Rex v. The Commissary of the Bishop of Winchester* (a). [Patteson J. mentioned *Rex v. The Archdeacon of Chester* (b)]. In such a case both parties may be sworn in, and the right afterwards tried between them. The election here was not void for want of a shew of hands. That proceeding was no necessary part of the election. Sir William Scott says, in *Anthony v. Seger* (c), "Where a poll is demanded, the election commences with it, as being the regular mode of popular election; the shew of hands being only a rude and imperfect declaration of the sentiments of the electors." "When a poll is demanded, it is an abandonment of what was done before;" "every thing anterior is not of the substance of the election, nor to be so received." And, upon a shew of hands, the votes could not be taken according to the scale laid down in stat. 58 G. 3. c. 69. s. 3., with reference to property. That statute applies to all proceedings in vestry not specially excepted, and clearly to elections of churchwardens. The question as to the mode of taking votes on an election of churchwarden was much discussed lately in *Campbell v. Maund* (d).

Hill and *Amos* contra. Under the circumstances stated this was a void election. If the meeting thought proper to proceed by a shew of hands, the rector had

(a) 7 East, 573. See *Ex parte Duffield*, 3 A. & E. 617.

(b) 1 A. & E. 342. S. C. 3 N. & M. 413. See *Rex v. The Churchwardens of St. Mary, Lambeth*, 1 A. & E. 346. note (b).

(c) 1 Hagg. Consist. Rep. 13.

(d) 5 A. & E. 865.

no right to control them; no poll having been demanded, he was not entitled to impose the expense of one upon the parish. The shew of hands is not forbidden by stat. 58 G. 3. c. 69., nor is it otherwise illegal; and it had been practised here for some years. [They then discussed the other facts relied upon as invalidating the election]. Assuming, then, the election to be void, a mandamus to elect is the proper remedy. It is suggested that a churchwarden is an ecclesiastical officer, and his election a matter of ecclesiastical jurisdiction. But the office is clearly temporal; *Rex v. Rice* (a), *Catten v. Barwick* (b). And in *Rex v. Dr. Harris* (c), where two sets of persons respectively claimed to have been elected churchwardens, and a mandamus had issued to swear in each, this Court would not allow a return that suits were depending in the ecclesiastical court to try which party was elected, but awarded a peremptory mandamus to swear in both. That shews that the nature of the office is no bar to the interference of this Court by mandamus. In *Rex v. The Minister and Churchwardens of Stoke Damerel* (d) a rule nisi had been granted for a mandamus to elect a sexton; and, on cause shewn, *Patteson J.* said, he was confident that the practice was to grant a mandamus to elect, where the office was filled by a void election, and there was no other remedy: but the rule there was discharged, because there was another remedy. Here there is none. No action could be maintained, because the office is not a benefit, but a burden. To contest the

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(a) 1 *Ld. Ray.* 138.(b) 1 *Str.* 145. See *Stutter v. Freston*, 1 *Str.* 52.(c) 1 *W. Bl.* 430. *S. C.* 3 *Burr.* 1420.(d) 5 *A. & E.* 584. *S. C.* 1 *N. & P.* 56.

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rates made by the officers elected, would be too inconvenient a mode of raising the question. *Rex v. The Mayor, &c. of Cambridge* (a) and *Rex v. The Corporation of Bedford Level* (b) shew that plenarty de facto will not prevent a mandamus issuing to elect or admit, where the election is clearly void, and there is no other attainable remedy. The same conclusion may be drawn from *Rex v. The Churchwardens of St. Pancras* (c). It is not suggested on the other side that this rule has been served upon improper parties (d).

LORD DENMAN C. J. The case which seemed most adverse to this application was *Rex v. Shepherd* (e); but it appears that the only reason assigned for refusing a quo warranto there was, that to claim the office of churchwarden wrongfully was not an usurpation on the rights or prerogatives of the Crown: it was not surmised that the party disputing the claim had another remedy. Nor is there any other in this case, as far as I can see. There is no mode of trying the right by action, because the office is not one of profit. And, if there has been an improper election, it is not desirable that the rates should remain in the hands of those who may have been parties to such wrongful election. Now,

(a) 4 Burr. 2008.

(b) 6 East, 356.

(c) 1 A. & E. 80. See pp. 100, 102.

(d) On this point he referred to *Prideaux's Directions to Churchwardens*, p. 41, 10th ed., cited by Sir J. Nicholl in *Wilson v. M'Math*, 3 Phillimore, 85.; *Anthony v. Seger*, 1 Hagg. Consist. Rep. 9.; *Rex v. The Churchwardens of St. Margaret*, 4 M. & S. 250.; and stat. 1 & 2 W. 4. c. 60. s. 2. Puttonson J. referred to *Rex v. Wix*, 2 B. & Ad. 197., and the cases there cited: see ib. p. 199. note (c).

(e) 4 T. R. 381. See *Rex v. Daubney*, 1 Bott. 347. pl. 358. (6th. ed.). S. C. 2 Stra. 1196.

on

on the facts stated here, I think it very questionable whether the election was a proper one. I do not know what opinion a jury might form; but there are strong circumstances which make its validity questionable. I do not see any thing in the omission to take a shew of hands. A shew of hands could be no criterion of the number of votes according to *Sturges Bourne's* act, 58 G. 3. c. 69., although, in cases where each man has one vote, such a mode of voting may sometimes be convenient. However, there are other circumstances here which raise a suspicion that the proceedings were not correct. [His Lordship then commented on other facts of the case not material to this report]. If the election is void, there ought to be another; and, if it be not void, still there are circumstances which render it fit that the parties should make a return, and shew how it is maintainable; the matter may then be put into a proper train of inquiry. I give this as my opinion, because I do not at present see any other mode of correcting that which may have been an improper proceeding.

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LITTLEDALE J. There is a doubt whether these churchwardens were properly elected; and I see no other mode in which we can proceed than to grant the rule for a mandamus. In the two cases first cited by the Attorney-General, a quo warranto lay; here, as in *Rex v. Shepherd* (a), it does not. [Sir W. W. Follett referred to *Anthony v. Seger* (b), as shewing that, in the present case, resort might be had to the ecclesiastical court]. I do not see my way so clearly to another remedy, as

(a) 4 T. R. 381.

(b) 1 Hagg. Consist. Rep. 9.

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to say here that a mandamus ought not to go. The objections which have been taken to the shew of hands are, I think, inapplicable; because, where the number of votes depends on property, a shew of hands could not decide any thing. The granting of this mandamus may no doubt be attended with difficulties; but I do not, at present, see any other mode of putting the case in the way of investigation than by making this rule absolute.

PATTESON J. I see no distinction between granting a mandamus to swear in one of two candidates, who says that, although apparently in a minority, he had a legal majority, and a mandamus to elect where an election has taken place, but under circumstances which are said to render it void. If we interfere by mandamus for the purpose of putting in the right person, where the wrong has been elected, I think we ought also to interfere in the manner here suggested, where the election is alleged to be void. On principle, I think that the mandamus ought to issue (a).

Rule absolute.

(a) *Williams J.* was absent.

1837.

SANDERSON *against* BROWN.Saturday,
June 10th.

THIS was an application by bail for an exoneretur.

The plaintiff, having obtained a verdict against the defendant, gave notice to the bail that judgment had been signed on *July* 27th, 1836, that a ca. sa. had been sued out thereon, *October* 28th, directed to the sheriff of *Yorkshire*, returnable *November* 9th, and had been left in the sheriff's office, *October* 29th, and duly entered four clear days in the public book there (a); that, on *November* 14th, the plaintiff had issued a sci. fa. against the bail, directed to the sheriff of *Middlesex*, returnable *November* 19th, and had duly left the same in the sheriff's office; and that, in default of their appearing to the sci. fa., judgment would be obtained thereon against them. This notice was dated *November* 14th, 1836, and reached the bail in *Yorkshire*, where they resided, on *Friday*, *November* 18th. They had had no previous notice of the ca. sa. or sci. fa., or of any proceeding to fix the bail. They applied to their attorney on the same day; and he, on *November* 20th, which was the first post day for *London* after the communication to him, wrote to *London* for an order for the bail to be at liberty to render. The order was received, *November* 22d, and the defendant was rendered at *York Castle* on the 24th. The bail deposed (in making the present application) that there had been no laches in effecting the render after the notice was received. A summons was obtained to shew cause why an exoneretur should

Under the rule of Court, *Hil.* 2 W. 4., I. 81., where a sci. fa. is issued against bail, and they are not summoned, they may render at any time within eight days from the return of the sci. fa.

(a) The return of the writ was not stated.

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not be entered; and the parties attended before *Patteson* J., who referred the case to the full Court. In *Hilary* term last, a rule nisi was granted for an exoneretur. In the same term (a),

Knowles shewed cause. The bail were not entitled to render on *November* 24th. In strictness, bail ought to be prepared to render at the return of the *ca. sa.*; whatever time is allowed them afterwards, is by the indulgent practice of the Court. By the former practice, if one writ of *sci. fa.* had been sued out, and duly left in the sheriff's office, and the bail summoned, they might render on the return-day of the *sci. fa.*; if two writs of *sci. fa.* were issued, the render must have been made on the second return-day, and no summons or notice was necessary. Now, by Reg. Gen. *Hil. 2 W. 4., l. 81 (b)*, "No judgment shall be signed for non-appearance to a *scire facias* without leave of the Court or a Judge, unless the defendant has been summoned; but such judgment may be signed by leave after eight days from the return of one *scire facias*." This rule makes no alteration as to render in the case where there is a summons; but it makes one *sci. fa.* sufficient where two were necessary before; and, therefore, even where there is no summons, the bail cannot render after the return of that *sci. fa.*; but judgment against them must not be signed without leave, nor until the expiration of eight days. It may be said that the bail have, by implication, eight days to render, after the return of the one *sci. fa.*; but there are no words to warrant the assumption. And

(a) *January* 31st. Before Lord Denman C. J., *Williams* and *Cole-ridge* Js.

(b) 3 B. & Ad. 386.

this

this inconvenience might result from it, that, in country cases (as to which no distinction is made), the bail might render on the eighth day in *Yorkshire*, and the plaintiff might, in ignorance of that fact, obtain leave on the ninth day to sign judgment, which must be afterwards set aside. It has been said to be the intention of the new rule that the bail should have notice of the proceedings (a); but no notice is prescribed; and, if it is to be understood that reasonable notice shall be given, that must vary with circumstances, and there can be no constant regulation. It may be contended that there ought, at least, to be such notice as will enable the bail to render by the return of the sci. fa.; but the rule makes no such provision; and, where a summons is necessary, it may be served on the very day of the return, at any time before the rising of the Court; *Clarke v. Bradshaw* (b), *Lewis v. Pine* (c).

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Busby, contra. This render was made in a reasonable time under the circumstances; and such time ought to be allowed. It was not the object of the rule to lay any additional pressure on bail. The intention was to substitute, for a second sci. fa., the interval of eight days before signing judgment, in cases where there was no summons. If this be not the effect of the rule, and the bail are at all events fixed on the return of the sci. fa., no object can be assigned for the eight days' delay. As was suggested by the learned Judge who referred this case to the Court, there is an analogy between the present rule and Reg. Gen. *Trin.*

(a) See *Wimall v. Cook*, 2 Dowl. P. C. 173. *Jervis's New Rules*, p. 64. note (c), 3d ed.

(b) 1 East, 86.

(c) 2 Dowl. P. C. 133.

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§ W. 4. III. (a), which directs that, when bail are sued in debt on the recognisance, they shall be at liberty to render at any time within fourteen days next after the service of process; and, on such render, and notice thereof, proceedings shall be stayed on payment of the costs of the writ and service. In this case a render, in itself regular, has been made without any unnecessary delay: *Thorne v. Hutchinson* (b) shews that in such a case the Court will not deal strictly with the bail.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

This was an application to enter an exoneretur on the bail-piece. The plaintiff proceeded by scire facias against the bail, who lived in *Yorkshire*. The writ was returnable on the 19th of *November*. The bail had notice in *Yorkshire* on the 18th, and the defendant was rendered on the 24th.

The question turns on the rule of *Hil. T. 2 W. 4.*, I. 81. (c). Before and since that rule, if the bail be summoned (which can only be in *Middlesex*, where the scire facias must be brought), the defendant must be rendered before the shutting of the office on the day of the return of one scire facias. Where the bail reside elsewhere, the practice of suing out two writs of scire facias is done away by the above rule, and an application to the Court or a Judge, after eight days from the return of one writ, for leave to sign judgment, is substituted. Before such leave is given, it must be proved that notice has been given to the bail, or that proper

(a) 5 B. & Ad. 468.

(b) 3 B. & C. 112.

(c) 3 B. & Ad. 386.

endeavours

endeavours to do so have been made without effect. The object of that notice is to enable the bail to render the defendant; and accordingly it is stated, in a note to Mr. *Jervis's New Rules*, p. 65., that *Bayley B.*, in a case of *Newton v. Flight (a)*, MS., 23d June 1832, at chambers, held that, where no notice had been given, a render fourteen days after the return of the writ was in time. Here, notice was given in *Yorkshire* the day before the return of the writ; but that notice is not the same thing as a summons in *Middlesex*. It would have entitled the plaintiff to obtain leave to sign judgment after eight days from the return-day, if nothing had been done in the meantime; but we are of opinion that those eight days were given for the very purpose of enabling bail to render, though the rule is not confined to proceedings against bail. It would be very strange if it were otherwise: for then the bail would be placed in a worse situation by the rule in question than they were before; and, if the plaintiff proceeds by action, they have fourteen days from the service of the writ to render, by Rule III. *Trinity* term, 3 *W. 4.* (b).

For these reasons, we think that the present rule must be made absolute.

Rule absolute.

(a) *P.* 65. note (c), 3d ed.

(b) 5 *B. & Ad.* 468.

The KING *against* The Poor Law Commissioners *Monday,*
for ENGLAND and WALES. In the Matter of *June 12th.*
the WHITECHAPEL Union.

This case is reported, 6 *A. & E.* 34.

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Monday,
June 12th.

The KING *against* The Poor Law Commissioners
for ENGLAND and WALES. In the Matter of
the NEWPORT Union.

This case is reported, 6 *A. & E.* 54.

The KING *against* HEWITT.

Monday,
June 12th.

This case is reported, 6 *A. & E.* 547. note (a).

Monday,
June 12th.

EMMERSON *against* SALTMARSHE and Others.

Under stat.
23 *H. 8. c. 5.*
s. 3., and a
commission
framed ac-
cording to it,
a sewer's rate
assessed in
gross on a
township at
large is bad,
though laid
only for de-
fraying the
expenses of the
commission,
and though
the rate has
been, in pre-
vious instances,
so assessed, and
submitted to
by the township
in question.

REPLEVIN. The defendants avowed and made
cognisance under the authority of the commis-
sioners of sewers. On the trial before *Parke B.*, at the
York Spring assizes, 1835, a verdict was found for the
plaintiff, subject to a case, which, so far as is material to
the point decided, was as follows.

The plaintiff was, at the time of making the distress,
constable of the township of *Elvington*; and was and
had been, for fourteen years previously, the occupier of
about forty-four acres of land in that township. One
defendant was bailiff of the other defendants, who are
commissioners of sewers, appointed by his Majesty's
commission, dated 12th of *July*, 1833, for *Howdenshire*
and the west parts of the East Riding of *Yorkshire*,
within which *Elvington* is situate.

The

The commission, granted under stat. 23 *H.* 8. c. 5., recited, that the walls, ditches, &c., sewers, &c., bridges, streams, and other defences by the coasts of the sea and marsh grounds in the East Riding, viz. for *Howden-shire*, &c. (setting out certain limits), by rage of the sea, &c., and by means of the trenches of fresh water descending, &c., were disrupt, lacerate, &c., with other impediments, annoyances, and defaults, specified; and it assigned commissioners, including the defendants, or any six of them, with a quorum of three, to survey the said walls, &c., to cause the annoyances to be corrected, “as also to inquire by the oaths of the honest and lawful men of our said county, place, or places where such defaults or annoyances be, as well within the liberties as without, by whom the truth may the rather be known, through whose default the said hurts and damages have happened, and who hath or holdeth any lands or tenements, or common of pasture, or profit of fishing, or hath or may have any hurt, loss, or disadvantage by any manner of means in the said places, as well near to the said dangers, lets, and impediments, as inhabiting or dwelling thereabouts by the said walls,” &c., “and other the said impediments and annoyances; and all those persons, and every of them, to tax, assess, charge, distrain, and punish, as well within the metes, limits, and bounds, of old time accustomed, or otherwise or elsewhere within this our realm, after the quantity of their lands, tenements, and rents, by the number of acres and perches, after the rate of every person’s portion, tenure, or profit, or after the quantity of their common of pasture, or profit of fishing, or other commodities there, by such ways and means, and in such manner and form, as to you, or six of you (whereof we will that three of you of the quorum shall

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1837. shall always be three), shall seem most convenient to be ordained and done for redress and reformation to be had in the premises; and also to reform, repair, and amend the aforesaid walls," &c.

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On 14th *December* 1833, a session of sewers was held, at which the Court made an order of that date, "that, for the raising of a fund to pay off and discharge the charges and expenses remaining unpaid, attendant upon, or incurred in, the execution of the commission of sewers for the shire and parts aforesaid, dated" &c., "and also the charges and expenses of the solicitation and suing out of the commission of sewers for the shire and parts aforesaid, dated" &c., "also unpaid, and such subsequent charges and expenses as shall attend and be incident to the execution, or in respect of, the same commissions, the constable and constables of *the several townships* within the shire and parts aforesaid, in the assessment hereunder written particularly mentioned, do, on or before the first day of *March* next, pay unto the *York* city and county banking company, at" &c. "in *Howden* aforesaid, the several and respective sum and sums of money in such assessment particularly rated, assessed, or imposed *upon each and every of the said townships*, for the purposes aforesaid." Then followed the assessment, one item of which was "*Elvington, 4l.*"

On 26th *April* 1834, at a session of sewers then holden, the commissioners made an order that the constable of *Elvington* should appear at the next court, "to shew cause why the sum of 4*l.*, rated or assessed upon the said township, by a certain rate" &c., had not been paid pursuant to the order of the Court.

The defendant appeared at the next court, and refused

fused to pay; upon which a warrant issued to one of the defendants, as bailiff, signed and sealed by the remaining defendants (all of whom were commissioners), reciting the rate and assessment on the township of *Elvington*, and that the plaintiff, constable of the township, being an inhabitant and holder of certain lands and tenements within the said township, and a party subject and liable to pay and contribute towards the said rate and assessment, had refused to pay the said sum of 4*l.*, though he had notice of the rate and assessment, and the sum had been demanded of him; and authorising and commanding the bailiff to levy the 4*l.*, with the costs, &c., on the plaintiff's goods by distress.

The earliest commission of sewers for the district in question, preserved amongst the proceedings of the Court, is in 8 *Anne*; and similar commissions (in the whole fourteen) appear to have been granted from time to time till the commission appointing the present defendants. It also appears by the books of the commissioners that, from 1725 to the present time, rates or assessments have been made by the commissioners acting under the said commissions upon the same townships, and in the same relative proportions, as the assessment of 14th *December* 1833, but for different amounts; and that the following payments of rates have been made by or for the township of *Elvington*. In 1725, *Elvington*, 1*l.*; 1728, *Elvington*, 1*l.*; 1748, *Elvington*, 1*l.*; 1759, *Elvington*, 1*l.* 6*s.* 8*d.*; 1828, *Elvington*, 2*l.*; 1831, *Elvington*, 4*l.*: and that the last two payments were made after orders of Court for such payment, and under threat of a distress upon the constable. It also appears from the books and proceedings of the commissioners that an order was made on 22d of *August*, 1778, requiring
the

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the attendance of several inhabitants of *Elvington, Barmby (a)*, and other places, at the next court of sewers, to shew cause why their assessments had not been paid; and that, by an order of the Court, dated 24th *October* 1778, a warrant of distress for levying a rate was issued against the inhabitants of *Elvington*.

From 1725 until the commencement of the present action, no instance, with the above exception, was proved, wherein disobedience to an order upon the constable for the rate laid by the commissioners upon the entire township was followed by a warrant of distress upon his goods: but no account of receipts of the rates from 1778 until the appointment of the present clerk, in 1831, has been kept. And no instance was produced of disobedience by a constable to any order of the commissioners for the payment of a rate, till the occasion of the present distress. [The case then stated certain facts, raising questions as to the jurisdiction of the commissioners, and the benefit received by the township of *Elvington* and the plaintiff in particular; but the decision of the Court renders it unnecessary to state the facts or arguments on these points.]

If the Court should be of opinion that the distress was illegal, the verdict for the plaintiff was to stand: otherwise, a verdict to be entered for the defendants.

The case was argued on a former day in this term (*b*).

Alexander for the plaintiff. The distress is not justified by the rate, which is bad, as being assessed on a whole township. By stat. 23 *H. 8. c. 5. s. 3.*, with which the commission corresponds, the parties subjected to the

(a) One of the townships named in the present assessment.

(b) *Friday, May 26th*, before Lord Denman C. J., *Littledale* and *Patteson* Js.

powers of the commissioners are the persons deriving benefit, or guilty of default: that can apply only to individuals. No other rule can be a fair one. The authorities collected in 2 *Phil. Ev.* 443 (a), and in *Woolrych's Law of Waters and of Sewers*, 395., are strongly in favour of the plaintiff on this point. In *The Case of the Isle of Ely* (b) it was resolved that a tax in gross upon a town is not warranted by the commission, but should be upon every owner or possessor of lands, &c. Mr. *Fraser*, in note (E) upon that case, has collected several authorities. A passage there extracted from Lord *Ellesmere's Observations* appears to shew that Lord *Ellesmere* considered a rate on a township to be good, because, upon emergency, the commissioners could not wait "till every acre or perch be by survey divided and numbered;" Lord Chancellor *Egerton's Observations on the Lord Coke's Reports*, pp. 13, 14. But this, at the utmost, can justify such a rate only in cases of emergency; and, indeed, before the emergency occurs, the commissioners ought to be sufficiently acquainted with the property to be able to lay the rate properly on the individuals. So, by the charter of *Romney Marsh*, cited in *Callis on Sewers*, 122, the tax is to be laid on the individuals. The first editor of *Callis* also cites *Hetley v. Boyer* (c), and *Custodes, &c. v. The Inhabitants of Owtwell* (d). These cases shew the rate on the township to be bad. They are cited, with most of the old authorities, in 19 *Vin. Ab.* 418. *Sewers*, (B). In *Bow v. Smith* (e) it was admitted that an assessment on all the lands, "from such a place to such a place in the level," was bad. There, indeed, Lord Chancellor *Macclesfield* said that it was

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(a) 7th ed.

(b) 10 *Rep.* 141 a.(c) *Cro. Jac.* 336.(d) *Style*, 178.(e) 9 *Mod.* 94. S. C. 2 *Eq. Ca. Ab.* 206.

not

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not necessary to name the owners, but that the particular lands should be assessed; here even that is not done. In *Masters v. Scroggs* (a) this Court laid down that "it ought to appear that the party assessed receives, or is likely to receive, a benefit." In the Appendix to *Callis*, No. viii., p. 352 (b), there is a precedent of a rate and assessment, where the whole is laid on the individual occupiers. It is true, that *Callis*, p. 123., after mentioning some authorities against rating a township, contends that such a rate is good: but the current of authorities is the other way. Here, too, the individual has been distrained upon for the tax laid on the whole township. *Callis* suggests that, if a party not liable at all be distrained on, he may bring trespass; and that, if he be liable at all, he may give in the names of the other parties liable and crave of the commissioners to make a law that all may contribute. He also observes that the township may apportion among themselves. The suggestion of such circuitous remedies shews the badness of the principle.

Cresswell, contra. It is admitted, on the other side, that the authority of *Callis* is in favour of a rate on the township. In this particular instance, the rate is laid to defray the expense of the commission; therefore the necessity of apportioning according to the benefit received does not arise; the proportions must be invariable; and it is like the acre rate which was held to be good in the *Case of the Level of Hull* (c). In *The Case of the Isle of Ely* (d) the rate was laid for making a new river, which it was held the commissioners could

(a) 3 M. & S. 447. See *Soady v. Wilson*, 3 A. & E. 248.

(b) 4th (*Broderip's*) ed. (c) 2 Str. 1127. (d) 10 Rep. 141 a.

not

not do. It was, indeed, also resolved that a rate on a township was bad. But the argument on that point is not given; and it may have applied to the particular case only. *Callis* states that, in *The Case of Sir Philip Conisby* (a), tried before Lord Coke the year after he had reported *The Case of the Isle of Ely* (b), an assessment laid generally on a township was treated as good. *Callis*'s doctrine is adopted in *Com. Dig. Sewers* (E 2.). The passage from Lord Ellesmere's *Observations*, referred to on the other side, is an authority to the same effect. And the resolutions in *The Case of the Isle of Ely* (b) were disapproved of by the Privy Council, whose decision is reported in *Moore*, 824. *Hetley v. Boyer* (c) was the case of a fine set upon a village and ordered to be levied on an individual, which is very different from a rate like the present. Even in the case of amercements, townships have been charged generally: *Callis*, p. 124, cites an instance from *Doctor and Student*, fol. 74 (d), and refers to the statute of *Winchester*, 13 Ed. 1. stat. 2. c. 2., making hundreds liable for the escape of felons. It is true that here the individual is distrained upon for the whole; but his remedy is to call on the commissioners to apportion. Having laid the rate on the township, they summoned him, being one landholder, to shew why payment was not made. He did not answer, as he might have done, that others were liable with him: non constat, therefore, that he is not the only party in the township liable. Besides, it seems from *Soady v. Wilson* (e) that, in an action of

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(a) *Call. Sew.* 128.(b) 10 *Rep.* 141 a.(c) *Cro. Jac.* 336.(d) *Dial.* 2. c. 9.(e) 3 *A. & E.* 248.

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trespass against the commissioners, the Court will not inquire into the quantum of benefit.

Alexander in reply. It is very doubtful whether an acre rate could be laid; *Commissioners of Sewers v. Newburg* (a). But, in that case, the particular lands receiving benefit would be designated. As to the argument, that the plaintiff, on being summoned, might have pointed out the proportions in which other occupiers in the township are liable, that would throw upon an occupier, under the penalty of distress, the duty which belongs to the commissioners. [*Patteson J.* referred to 37 *Assis.* fol. 218 A., pl. 10., and 38 *Assis.* fol. 225 A., pl. 15., cited in *Call. Sew.* 123.] It does not appear that either of those was the case of a sewers' rate.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

The question in this case is, whether a rate or assessment can be made by the commissioners of sewers upon a whole township. And it will be proper, in the first instance, to advert to the commission of sewers itself, to see the powers of the commissioners.

They are to inquire by the oaths of the honest and lawful men of the county, (His Lordship then read the commission, as set out at p. 267, ante, to the words "to be had in the premises").

Now, such being the effect of the commission, in the *Case of the Isle of Ely* (b) it is stated to be clearly re-

(a) 3 *Acb.* 827.

(b) 10 *Rep.* 141 a.

solved

solved that the tax generally of a several sum in gross upon a town is not warranted by the commission of sewers, but it ought to be particular, according to the express words, upon every owner or possessor of lands, tenements, and rents, &c. That indeed was a case of a new river: but still the fourth resolution of Lord *Coke* and the two judges, to whom the decree of the commissioners of sewers was referred, must be considered as authority.

In *Moore*, 824, at a meeting of a board of the Privy Council, a full report upon the authority of the commissioners of sewers was made by Lord Chief Justice *Popham*; "that they cannot lay a tax or rate upon any hundreds, towns, or the inhabitants thereof in general, but upon the first presentment and judgment to charge every man in particular according to the quantity of his land or common (a)."

The same rule was laid down in *Hetley v. Boyer* (b). So also in the case of *Custodes &c. v. The Inhabitants of Outwell* (c). Several other cases will be found collected in *Viner's Abridgement*, tit. *Sewers*, and in *Comyns's Digest*, tit. *Sewers*: and reference is made to several cases in *Fraser's* edition of *Coke's Reports*, in *The Case of the Isle of Ely* (d).

Callis, however, in page 122 and the following pages, says that a rate or assessment may be made on a town generally, and that the persons who are liable may afterwards apportion it among themselves; though he

(a) See p. 277, post; and *Moore*, 828.

(b) *Cro. Jac.* 336.

(c) *Style*, 178. *Mich.* 1649. *Hetley v. Boyer* was decided, *Hil.* 11 *Ja.* 1. (1614), between the decision in *The Case of the Isle of Ely* (*Mich.* 7 *Ja.* 1. 1609), and the resolution of the Privy Council, *Moore*, 824. (*Nov.* 1616), and appears to be one of the cases referred to by that resolution.

(d) Note (E) to 10 *Rep.* 143 a.

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also says, in another place, that the commissioners may, in the first instance, assess the particular individuals; and he cites a number of instances to prove his proposition. The cases he cites appear to be amercements on towns or other districts; but which are not circumstanced as assessments made by commissioners of sewers, where their duty is prescribed by the commission itself.

Comyns, indeed, in his *Digest*, tit. *Sewers*, (E. 2.), says that an assessment may be charged in general upon such a town, who may afterwards apportion it among themselves; but the only authority he cites for that is *Callis*. And *Comyns* afterwards says that an assessment upon a town in general, if it be not afterwards apportioned, is not good.

And it does not appear that there is any other direct authority for the validity of the assessment upon an entire township but what is derived from *Callis*. And we think that the other several authorities outweigh his.

The *Case of the Level of Hull* (a) was cited in support of the assessment: but that appears to be an assessment of 9d. an acre on 1312 acres; and we therefore may suppose that the commissioners had considered what lands were liable; and the question there appears to have been, whether it should have been upon the occupiers; but, supposing it did support *Callis*, it could not, in our opinion, be a sufficient answer to the other authorities.

It has been said that this is the course which has been pursued ever since the year 1725. That may be; and perhaps it may, upon the whole, have been found more

(a) 2 Str. 1127.

convenient to let the landowners settle the proportions among themselves, so as not to trouble the commissioners to fix the proportions, unless there should be a necessity. This course of practice, however, cannot vary the law of the case: and, upon the whole, we are of opinion that the general assessment cannot be supported; and that there must be

Judgment for the plaintiff.

[The following addition to the judgment is made by the desire of the learned Judges.

The Court inadvertently cited the case from *Moore* 824, in support of this judgment; but, though the words in *Moore* are the same as in the present judgment, yet in the case in *Moore* the Court express their disapprobation of those propositions. But, though this case was thus cited inadvertently as an authority in favour of the plaintiff, it makes no difference in the judgment of this Court on the whole case; as they do not concur in the disapprobation expressed in the report in *Moore*.]

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The KING against LARRIEU.

Monday,
June 12th.

A RULE was obtained last term, calling upon *Eugene Larrieu* to shew cause why a criminal information should not be filed against him for certain misdemeanors. The prosecutor, a merchant carrying on business in *France* and *America*, had commenced an action in *France* against the defendant's father, *Joseph*

The Court will not grant a criminal information for sending a challenge, if, in the course of the transactions out of which it arose, the prosecutor has himself sent a challenge to

a third person connected with the party against whom he moves. Although the prosecutor's challenge was sent into a foreign country, and did not shew any intention to break the peace here.

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Larrieu,

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—
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against
LARRIEU.

Larrieu, who lived at *Paris*, for money alleged to be due from him to the prosecutor, on a sale of tobacco in which they were jointly concerned. The defendant, on *May* 3d, 1837, sent a letter to the prosecutor (both at that time residing in *England*), stating that the defendant was informed by his father of the suit which had been commenced; that his father had been insulted by the prosecutor; and (after other reflections on the prosecutor's conduct in his dealings with *Larrieu*, senior) that the defendant demanded immediate satisfaction if the suit were not put an end to by a time which he named. This letter was the subject of the present motion.

The defendant made affidavit, in answer, that, in last *March*, Mr. *Joseph Larrieu* had a dispute in *Paris* with Mr. *Lewis's* agent, and, in the course of it, censured *Lewis's* conduct in the tobacco transaction: and that, on the 31st of the same month, Mr. *Joseph Larrieu* received a letter (which he afterwards transmitted to the defendant) written by Mr. *Rogers*. This letter began: — "Sir, Having heard that you have calumniously outraged me on the Exchange of *Paris* the 20th instant, I sent you by return of post a challenge, which my friends have not thought it expedient to deliver to you, from motives which I am forced with pain to admit and to submit to." The writer then stated duties which compelled him to remain in *London*; adding, "These duties fulfilled, I shall not delay a moment in demanding from you a satisfaction as notorious" &c.; and he concluded by stating that he had two objects to accomplish: "The first is, to let you know, and moreover to let every body know, my determination not to forget your insult; and the second is to settle the accounts of my house with you, and to demand of you payment of a tolerably large
balance

balance which you owe me." The prosecutor's action against *Joseph Larricu* was commenced subsequently.

The defendant stated that the letter which he himself sent was occasioned by heat and excitement arising from the above-mentioned communication, and the insults offered to his father.

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against
LARRICU.

Cresswell now shewed cause. A prosecutor cannot demand a criminal information for misconduct in which he himself has participated. This principle, upon which a rule for a criminal information was discharged in *Rex v. Peach (a)*, applies here. The Court does not interpose in cases like the present merely to preserve the peace, which may be done by other means, but will look at the conduct of those who seek its interference.

Sir *J. Campbell*, Attorney-General, and Sir *W. W. Follett*, *contrà*, were then called upon by the Court. The challenge now complained of is not occasioned by the letter of provocation sent to the defendant's father, but by the suit commenced against him. [*Patteson J.* Assuming it to be so, that is not the point. If the prosecutor has sent a challenge in the course of the same transaction which is now before us, can he come to the Court and claim protection, having himself violated the law in the same manner as the defendant?] He has not violated the law of this country, if of any. [*Patteson J.* Whether he has done so or not, still, having sent the challenge deposed to, can he come to this Court for a criminal information? The question turns upon the merits of the party applying.]

(a) 1 *Burr.* 548. See *Rex v. Steward*, 2 *B. & Ad.* 12.

1838.

The KING
against
LARRIEU.

Lord DENMAN C. J. The prosecutor has done much to provoke what has taken place ; and his conduct has been improper in what has passed in connection with these parties. I do not say that, if he had been guilty of such conduct towards one of them some years ago, that would be an answer to the present application : but, under the circumstances disclosed, he is clearly not entitled to a rule.

LITTLEDALE, PATTESON, and WILLIAMS Js., concurred.

Rule discharged without costs.

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The KING *against* The Governors and Directors
of the Poor of the United Parishes of ST.
ANDREW HOLBORN ABOVE THE BARS and ST.
GEORGE THE MARTYR, and CHARLES BOYDELL,
their Clerk.

Monday,
June 12th.

SIR J. CAMPBELL, Attorney-General, in this term,
June 3d, obtained (by a rule absolute in the first
instance (a), on account of the alleged urgency of the
case) a mandamus, tested 2d June, 7 W. 4., directed to the
defendants (b), reciting as follows. "That, by an order

By the rule of
Mich. 4 Ann.,
there must be
fourteen days,
at the least,
between the
teste and return
of every original writ of
mandamus, if

directed to parties residing beyond forty miles from Westminster; and, if to parties within
forty miles, then eight days.

Quære, whether the Court, on a proper case being shewn, will direct the return to be
made in a shorter time?

But if, without special direction of the Court, the mandamus be drawn so as to allow
less time between the teste and the return, the Court will supersede the mandamus for
irregularity, and award an alias writ.

And this, though the case be one in which the Court, on the ground of urgency, grant
the rule for the mandamus absolute in the first instance; as where the writ issues to compel
payment of money for the support of paupers.

(a) In *Michaelmas* term, 1836 (November 8th, before Lord Den-
man C. J., Patteson, Williams, and Coleridge Js.), Greaves obtained a
rule absolute in the first instance for a mandamus to the overseers and
churchwardens of the parish of Edlaston, in Derbyshire, reciting that
there was no rate made by them on the inhabitants, &c., for the necessary
relief, maintenance, and support of the poor; and that they neglected
and refused to make it; and commanding them to make and publish,
and cause &c., a rate &c. The affidavit in support of the rule stated
that the rate was absolutely necessary for the relief of the poor and for
other purposes to which the rate was applicable. A return was filed,
upon which a concilium was afterwards obtained, and the case was set
down for argument.

(b) Appointed under stat. 6 G. 4. c. clxxv. (local and personal, public),
'for the better ascertaining, charging and collecting of the rates for the
relief of the poor within that part of the parish of St. Andrew Holborn
which lies above the Bars in the county of Middlesex, and the parish of
St. George the Martyr, in the said county; for the better maintenance,
employment and regulation of the poor thereof; and for regulating the
nightly watch thereof.' See the clause as to appointing governors and
directors, 6 A. & E. 59. note (a).

of

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—
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against
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of St. ANDREW
and
St. GEORGE.

of the Poor Law Commissioners for *England and Wales*, the said parishes, with a liberty in the order specified, had been formed into an union, and guardians appointed, who had taken on themselves the office; that the collection of the poor rates for the two parishes was vested in the defendants, under stat. 6 G. 4. c. clxxv.; that they had collected and received large sums as poor-rates, exceeding the amount after specified; that the guardians of the union had issued several precepts, directing the defendants to pay several sums, amounting in all to 1940*l.*, to the treasurer of the union, out of the poor-rates of the two parishes so received by them, which was necessary to enable the guardians of the union to maintain and provide for the poor of the two parishes, and defray such of the general expenses of the union as were chargeable on the two parishes; and that the defendants had refused and neglected to pay: the writ then commanded the defendants to pay the said sums, or shew cause to the contrary: returnable 9th *June*, 7 *W.* 4.

Several returns were filed, one by *Charles Boydell*, the clerk, alone; and three others, signed, respectively, by sixteen, twelve, and nineteen governors and directors.

Erle, on behalf of certain of the governors and directors of the poor of the two united parishes, obtained a rule in this term (*June* 8th) calling upon the prosecutors to shew cause why the writ of mandamus should not be superseded for irregularity, there not being eight days between the teste and return. The affidavit in support of this rule shewed that the parties on whose behalf it was obtained had severally been served with a
copy

copy of the mandamus; and that the return signed by *Boydell* was made without their sanction or knowledge. The affidavit also contained statements for the purpose of shewing that the parties making the return were not authorised to do so; but it is unnecessary to notice these further.

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against
The Governors
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of St. ANDREW
and
St. GEORGE.

Sir *J. Campbell*, Attorney-General, and *Wightman* now shewed cause. The parties making this application cannot be heard. The board consists of fifty members, besides the ex officio governors and directors, of whom seven are a quorum (ss. 5, 11,); there is, therefore, a return actually made. The formal objection, as to the interval between the teste and return, cannot be taken at this stage, nor in this shape. Besides, this Court has power to regulate the interval according to the exigency of the case, and has, in fact, frequently done so.

Erle, contrâ. Every party called upon by the command in the mandamus has a right to take the objection. There must be fifteen days between the teste and return, if the mandamus go above forty miles, otherwise only eight days; *Com. Dig. Mandamus*, (C. 4.); *Anonymous*, 2 *Salkeld* (a); *Rex v. Major' et Jurat' de Dover* (b). [*Manning*, *amicus curiæ*, suggested that the rule mentioned in these two cases applied only to corporations. Lord *Denman* C. J., after consulting with the officers,

(a) 2 *Salk.* 434.

(b) 1 *Str.* 407. In this case, it is said to have been settled that, if the place be more than forty miles from *London*, there must be *fourteen* days, and eight in other cases; one day inclusive, the other exclusive, in all cases.

said

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against
The Governors
and Directors
of St. ANDREW
and
St. GEORGE.

said that the rule was quite general (*a*), though the report in *Salkeld* appeared to confine it to corporations (*b*).]

Lord DENMAN C. J. In the first place, it is doubtful whether Mr. *Erle* has a right to be heard. I cannot agree that, when a body, to whom a mandamus is addressed, has regularly resolved upon and made a return, individual dissentients can be allowed to dispute its propriety. We might, in that case, have as many returns as there are individuals. But here we decide on the form of the mandamus. The practice as to the interval between the teste and the return is well established, according to the rule of Court. I do not say that we are not at liberty to depart from that practice; if a case were properly brought before us, we might see reason for dispensing with the rule. But parties obtaining a mandamus are not to exercise such a discretion according to their own view of the particular facts; if they could do so, we should have the practice continually varying according to the fancies of individuals. Therefore, neither the writ nor the attempted discharge is good.

(*a*) The rule is as follows:—

Die Martis proximo post 7 Mfc. St. 4 Ann.

It is ordered, that between the teste and return of every original writ of mandamus there shall be a space of fourteen days at the least, if such writ shall be directed to any person or any persons commorant or residing beyond forty miles from *Westminster*; and, if it be within forty miles, then there shall be eight days between the teste and return thereof; and that every writ of mandamus shall bear teste the same days on which it shall be granted by the Court.

(*b*) Sir *W. W. Follett*, after *Erle* had been heard, claimed to shew cause on behalf of some of the parties who had made the returns; but the Court refused to hear him at this stage of the case.

LITTLEDALE,

LITTLEDALE, PATTESON, and WILLIAMS Js., concurred.

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Sir *J. Campbell*, Attorney-General, prayed that the rule might not be made absolute with costs.

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The Governors
and Directors
of St. ANDREW
and
St. GEORGE.

Lord DENMAN C. J. We do not decide that the rule is to be made absolute at all. It is our own proceeding.

Ordered, that this writ of mandamus be superseded for irregularity, and an alias writ of mandamus awarded.

The KING *against* JOHN GANN COUSINS.

Monday,
June 12th.

The KING *against* Twelve other Persons,
severally.

RULES were obtained on a former day of the term in the above cases, calling upon the prosecutor to shew cause why all proceedings in the several prosecutions, on information in the nature of quo warranto, should not be stayed until the determination of another rule now pending in this Court, in the case of a like information against *Thomas Brightwell*. The last mentioned information, for claiming to be an alderman of the city of *Norwich*, was tried at the *Norfolk* Spring assizes in this year, and a verdict found for the Crown. A rule was obtained in the last *Easter* term to shew cause why a verdict should not be entered for the defendant, or a new trial had; which was the depend- Several quo warranto informations having been filed on the same grounds, for exercising the office of alderman of the same corporation, one was tried, a verdict found for the Crown, and a rule nisi granted for a new trial, or to enter a verdict for the defendant. A rule nisi was then obtained for a stay of proceedings in the other informations pending the above application.

The Court discharged the rule, the prosecutor undertaking to proceed with only one other information till further order. But they refused to direct that either party should be bound by the result of such one proceeding.

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The King
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Cousins.

ing rule above mentioned. The grounds upon which the rule for that information had been granted were, that the defendant was not duly elected; that he was not proposed separately to the councillors; that the persons proposed as aldermen were proposed jointly and not separately; and that no separate proposal was made, or vote come to, as to the election of the defendant. The rules against *Cousins* and twelve other parties, to which the present applications related, were granted on the same day (*November 24th, 1836*) on which the rule was made absolute against *Brightwell*, and at the instance of the same relator, *Henry Rogers*; the informations were likewise for claiming the office of alderman of *Norwich*; and the grounds stated in applying for the informations respectively were the same as in *Brightwell's* case, with the addition, only, that the individual was proposed and elected jointly with a list of himself and others together, and not otherwise. In support of the present application, it was stated that the parties now applying did not shew cause against the rules as to them, having no other cause to shew than that already submitted by *Brightwell*, and the rules were therefore made absolute; and that the affidavits used in obtaining the rule against *Brightwell* were in all material respects the same as those used against the several parties now applying. It was further stated that *Rogers* was preparing to exhibit informations, in pursuance of the rules granted, against all the present applicants, and that (as was believed) there were no other questions to be tried on those informations than were in issue upon that filed against *Brightwell*. On the rules now coming on for determination, it was suggested that the prosecutor should try one more information, the result of which should decide the rest.

Sir

Sir *W. W. Follett* and *Kelly* shewed cause, and stated that the prosecutor was willing, on the rule being discharged, to proceed with a single information; but that if the cases were to be consolidated, the defendants only, and not the prosecutor, must be bound by the result; and they cited *Doyle v. Anderson (a)* as an analogous case.

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Sir *J. Campbell*, Attorney-General, *contra*, denied the analogy between these prosecutions and actions on a policy of insurance, and insisted that, if the prosecutor was not bound by the event of one case, the defendants must claim the like liberty.

Lord DENMAN C. J. The prosecutor is willing to proceed at present with only one case. I should be glad that that were final; but I do not find that it has been usual to make a rule for such a purpose. The defendants certainly obtain an advantage by the suspension of all the cases but one. The only rule we can make is, that the prosecutor shall, at present, try only a single information: but we order nothing as to any party being bound by the result.

LITLEDALE, PATTESON, and WILLIAMS Js. concurred.

It was ordered, that the rule nisi for staying proceedings, as above-mentioned, should be now discharged, "the prosecutor hereby undertaking to file an information in one of these prosecutions only, and to proceed to trial in such one information only, until the further order of this Court."

(a) 1 A. & E. 635. See *Hollingsworth v. Brodrick*, 4 A. & E. 646.

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REGULA GENERALIS.

*Monday,
June 12th.**Trinity term, 1837.*

In the King's Bench.

WHEREAS, by the practice of this Court, sheriffs may now be required to file writs with their returns as well in vacation as in term time, and upon all writs filed in vacation an extra charge of five shillings and tenpence is paid for keys of the treasury; And whereas the like charge of five shillings and tenpence is also paid upon all searches made in vacation for writs so filed, and upon all copies of such writs, or returns thereof: It is ordered that, from and after the last day of this present term, such extra charge of five shillings and tenpence be discontinued upon all writs filed by sheriffs in vacation, and all searches for such writs, and all copies thereof, or of returns thereto; and that hereafter, in vacation, such writs may be filed by sheriffs, and searches made for the same, and copies of such writs or returns thereto, made and obtained without payment of the said extra charge of five shillings and tenpence.

(Signed)

DENMAN.

J. LITTLEDALE.

J. PATTESON.

J. WILLIAMS.

J. T. COLERIDGE.

END OF TRINITY TERM.

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TRINITY VACATION.

Tuesday,
June 13th.

IN THE EXCHEQUER CHAMBER.

(Error from the King's Bench.)

ALSTON, Clerk, *against* ATLAY.

DEBT for treble value of tithes not set out, under stat. 2 & 3 *Ed. 6. c. 13. s. 1.* The declaration (of 29th February 1834) stated that the plaintiff, before and at &c., was, and still is, rector of the parish of *Cowsby* in the county of *York*, and proprietor of the tithes of corn, &c., yearly arising on land occupied by the defendant during all the time &c.; and that defendant, to wit on 1st January 1832, and on divers other days &c., at &c., reaped certain corn then growing upon the said land, the tithe of which said corn then belonged to plaintiff, and of right ought to have been set out and paid to him as such rector and proprietor as aforesaid, &c. Averment, that defendant, after the said reaping, and before the commencement of this suit, took and carried the said corn from the land, the tenth part of the said corn not having been separated &c., or agreement made &c., contrary to the form of the statute. (There were other counts not material here.)

Plaintiff, being incumbent of the living of *C.*, which was under the annual value of *8l.*, accepted the living of *O.*, with cure of souls. Afterwards, the patron of *C.* sold the advowson to *L.*; and *L.* presented a clerk, who was instituted and inducted, and subscribed the Articles. Held, that the living, as against the patron, was void by plaintiff's acceptance of *O.*, and disannexed from the advowson; that, consequently, it did not pass by the sale; that *L.*'s presentee was not incumbent; and that plaintiff, not having been ousted de facto, might sue for the tithes.

Plea, Non debet: and issue thereon. On the trial before *Parke B.*, at the *Yorkshire* Spring assizes, 1835,

And that it made no difference, as to this, whether the patron of *C.*, or his vendee, knew or did not know of plaintiff's acceptance of *O.*

By the Court of Exchequer Chamber, reversing the judgment of the Court of K. B.

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U

a verdict

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a verdict was found for the plaintiff for the treble value of the tithe, subject to the opinion of this Court on the following case.

The rectory of *Cowsby* is a benefice under the value of 8*l.* in the King's books; and the plaintiff was instituted and inducted into it in 1816, and duly subscribed and read the Articles. The defendant, who was a farmer in *Cowsby*, paid his tithe regularly to the plaintiff, as rector, down to *Michaelmas* 1832; but did not pay to the plaintiff, or set out, the tithes accruing subsequently (including those which are the subject of this action), in consequence of the same being claimed by the Reverend *George Wray*.

In 1829 the plaintiff was instituted and inducted into the rectory of *Odell*, in the county of *Bedford*, being distant 100 miles from the said rectory of *Cowsby*, upon the presentation of his brother, and subscribed and read the Articles. *Odell* is a benefice with cure of souls of higher value than 8*l.* in the King's books. In 1831 *Justinian Alston*, the brother of the plaintiff, who was owner of the manor of *Cowsby*, and of an estate there, and patron of the rectory of *Cowsby*, sold the manor and estate, and the advowson, right of patronage and presentation of and to the rectory or parish church of *Cowsby*, to *George Lloyd*, and the same were conveyed to him by indentures bearing date 27th and 28th *November* 1831. In 1832 *Lloyd*, thinking that the rectory of *Cowsby* had become voidable in consequence of the acceptance by the plaintiff of the rectory of *Odell*, and that he, *Lloyd*, had then a right to present a clerk to the rectory of *Cowsby*, presented the Reverend *George Wray* to such rectory; and, in pursuance of such presentment, *George Wray* was instituted and inducted

ducted into such rectory, and read and subscribed the Articles.

Either party, with the consent of the Court, was to be at liberty to turn the case into a special verdict.

The case was argued in the Court of King's Bench on *Friday, June 3d, 1836*, by *Wightman* for the plaintiff and *Tomlinson* for the defendant. The arguments on each side will be sufficiently collected from the judgments given in the Court of King's Bench, and from the subsequent discussion in the Exchequer Chamber.

Lord DENMAN C. J. The question is, whether the plaintiff had ceased to be parson by the second presentation. That depends upon the question, whether the right to present passed by the sale. In the case of a living actually void at the time of the sale, such right, for that turn, does not pass. It is not contended that the living, here, was void *de facto* at the time of the sale. The first living not being of the value of 8*l.*, stat. 21 *H. 8. c. 13. ss. 9, 10*, does not apply. But, by what may be called a common law adoption of the canon of the council of *Lateran* (*a*), the living was voidable at the election of the patron, who might immediately present. It is said that this is within the same mischief as if the living were actually void, and that, therefore, the sale did not pass the right to present upon such an avoidance. If we so held, we should be making the law, not declaring it. There is nothing more dangerous than to argue that, because in one case the mischief is the same as in another, therefore the law existing as to the latter case is to be extended to

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(a) See *Watson's Clerg. I.* ch. 2. p. 5.; citing *Stavelly v. Ullithorn*, *Hardr.* 101.

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the former, as to which no such law exists, written or unwritten. No case has hitherto gone so far as to enable us to say that the first living can here be treated as void.

LITLEDALE J. The common law so far adopts the canon of the council of *Lateran*, that a patron of a living worth less than 8*l.* may treat it as void, upon the incumbent accepting a second living. Unless he does so, it is not void *de facto*. The incumbent might indeed be deprived; and then the patron must present in six months; but that is not done here. If the incumbent be not either called upon by the patron to resign, or deprived, the church is full, and the incumbent is entitled to the tithes. Here the patron does not avoid the living by a fresh presentation, but sells the advowson. The question then is, whether the sale passes the right to present immediately, or whether the original patron retains it, or whether neither vendor nor vendee has it (*a*). A second question might perhaps be put; whether, if the sale passed the immediate right of presentation, the alienee took such right as the vendor held it, or whether he would be under the necessity of resorting to proceedings in the Ecclesiastical Court before he could present. I am of opinion that the conveyance passed the immediate right to present without having recourse to the Ecclesiastical Court. It would not pass the right if the living was void; but here I think the presentation was still part of the advowson. It is true that the original patron could have made the living void, if he had chosen: but it is not void unless

(*a*) As to this, *Leak v. The Bishop of Coventry*, *Cro. Eliz.* 811., was cited in the argument in *K. B.*

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he makes it so; and he has not, in fact, made it void, but, on the contrary, treats it as full. It is argued that this construction may lead to simoniacal contracts. But this is not the case of a living void at the time of the sale. It is not a fruit fallen: the presentation is not severed from the advowson till the patron presents or the incumbent is deprived. The vendee of the advowson stands therefore in the same position as the original patron; and his presentee is a perfectly good incumbent.

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PATTESON J. The question is, whether the sale of an advowson passes the right of immediate presentation, the living being voidable at the time of sale. The authorities shew only that it does not pass the right when the living is void. The plaintiff seeks to carry this further. The reason why the next presentation does not pass when the living is actually void at the time of the sale is that the next turn is, in that case, not a part of the advowson. That is the whole effect of *Rennell v. The Bishop of Lincoln* (a). The next presentation is disannexed from the advowson, and has become a chose in action. I am not prepared to say that there is not another principle, the simoniacal nature of the contract; but the former principle is sufficient. Now, in the present case, the living is merely voidable: it is not void till there be a new presentation or a deprivation. The plaintiff's counsel does not deny that the sale would pass the right to present on the death or deprivation of the first incumbent: if that be so, it is very difficult to say that it does not pass the right to present

(a) 7 B. & C. 113. in error from C. P., reversing *S. C. 3 Bing. 223.*; judgment of K. B. affirmed in *Dom. Proc., Mirehouse v. Rennell*, 8 Bing. 490.

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which accrues by reason of the plurality. The bishop has the power of depriving the incumbent. According to one authority (a) (if it be law) the bishop may, by giving the patron six months' notice of the acceptance of the second benefice, present, in his default, without actual deprivation. At all events, he may make the living void, and must give notice to the patron. It is conceded that the vendee here purchases the next presentation for some purposes: and we cannot say that he takes it for some purposes, and not for others, unless there be an actual case of simony. The counsel for the plaintiff cited *Walker v. Hamersly* (b), where it was held simony to sell an advowson with a covenant to present the bargainee's nominee, the church being then full by usurpation, and a quare impedit pending thereon, by which the usurper was afterwards removed: the ground assigned being that the church was not full of the usurper, but void from the death of the last incumbent. No doubt that is correct. But what would the vendee there demand in a quare impedit? The very turn which is void at the time of the sale. That of course could not pass by the sale. If the decision go beyond this, it is not law; but it clearly is meant to apply only to that turn. It is also argued for the plaintiff that, if the patron become bankrupt while the church is void, though the assignees take the advowson by the assignment of the commissioners, the bankrupt retains the immediate presentation (c). That is because the

(a) The learned Judge, in the course of the argument, had referred to 17 Vin. Abr. 382, *Presentation*, (R. b), pl. 6., where *Baldock's Case* is cited. See *S. C. as Rex. v. The Bishop of London*, 1 (Wm.) Jones, 404.

(b) *Skinn.* 90. *S. C.* 3 Lev. 115.

(c) On this point, 2 *Gibson's Codex*, 794. tit. xxxiv. ch. 2. (2d ed.) was cited for the plaintiff. And see stat. 6 G. 4. c. 16. s. 77.

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commissioners take only the bankrupt's estate; only what is worth money: and the presentation to a void living is a mere trust; at all events it is not worth money. There is nothing peculiar in the position of the commissioners; if the next turn be saleable at all, their assignment passes it; and I do not know that the sale of the interest in this case does harm more than in any other. *Halton v. Cove* (a) is not in point. The question there turned entirely on the language of stat. 28 H. 8. c. 11. s. 3. Reference was there made to the canon of the council of *Lateran*, which directs that the incumbent taking a second benefice with cure of souls, while holding the first, "eo sit jure ipso privatus:" but the case shews a clear distinction between ipso jure and ipso facto. It is true that the purchaser here gets, in fact, almost a vacant living, a living which he may immediately make vacant. Still I see so much difficulty in extending the statute to meet the supposed mischief, that we must, in my opinion, give our judgment for the defendant.

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WILLIAMS J. The argument for the plaintiff is, that the purchase was made while the living was voidable, and that this comes to the same thing as if it had been void. I think that is not so; and that, the living being merely voidable in law, the purchaser took the next presentation. Then does any case go so far as to authorise our saying that the law is the same in the two cases, because the mischief is the same? In *Fox v. The Bishop of Chester* (b) this Court acted upon that prin-

(a) 1 B. & Ad. 538.

(b) 2 B. & C. 635.

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ciple ; but, on appeal, the House of Lords (a) thought the analogy unsafe, and reversed the decision. I am, therefore, of opinion that the purchase was valid as to the next presentation ; and that our judgment must be for the defendant.

Judgment for defendant.

Leave was obtained to turn the case into a special verdict. The verdict corresponded precisely with the special case ; and judgment thereon was entered in the King's Bench for the defendant.

Error being brought in the Exchequer Chamber on the judgment of the Court of King's Bench, the case was argued on *Wednesday, May 10th 1837*, before *Tindal C. J., Bosanquet and Coltman Js., Bolland, Parke, and Gurney Bs.*

Wightman, for the plaintiff in error (the plaintiff below). A right of presentation to a living, circumstanced as the living of *Cowsby* is here found to be, cannot be sold so as to enable the vendee to make the living absolutely void by presentation. The sale of a presentation to a living actually void gives no right to present for that turn. But the sale of a living, known by both vendor and vendee to be so circumstanced that it must shortly become void, is good ; *Fox v. The Bishop of Chester* (b). The present case may be considered as intermediate ; for, as the first living was not of the value of 8*l.*, it did not become void, de facto, under stat. 21 *H. 8. c. 13. ss. 9, 10.*, but only void de jure, by the

(a) *Fox v. The Bishop of Chester*, 6 *Bingh.* 1.

(b) 6 *Bing.* 1. in *Dom. Proc.*, reversing *Fox v. The Bishop of Chester* in *K. B.*, 2 *B. & C.* 635.

canon

canon law; that is, it was voidable by the patron's presentation, or by deprivation, but full de facto in the meanwhile; 3 *Burn's Ec. L.* 96, *Plurality*, s. 2., citing *Watson's Cl. L.* c. 2. The distinction is recognised in *Wolferstan v. The Bishop of Lincoln* (a), and *Halton v. Cove* (b). In *Wilson's* report of *Wolferstan v. The Bishop of Lincoln* (a) it appears that one ground insisted upon as making the sale of a void living void as to the next turn was, that the next presentation was then in the nature of a chose in action. But this was disclaimed by Lord *Mansfield* and *Wilmot J.*, who, as appears from the report in *Burrow*, rested the objection only on public utility. Now, if the next presentation can be sold after the living has become actually voidable by the patron's presentation, the danger of simony is as great as upon the sale of a presentation to a living actually void. The vendee obtains, in fact, on purchase of a living immediately voidable by his own presentation, as full a practical right as if the living were actually void. In *Fox v. The Bishop of Chester* (c) the Court of King's Bench thought a sale, where the incumbent is known to be *in extremis*, liable to the same objection. It is true that the case there cited, mentioned by *Hutton J.*, in *Sheldon v. Bret* (d), is an imperfect authority; and the decision of the House of Lords must be admitted to have proceeded upon a sounder principle than that of the Court of King's Bench, inasmuch as the death of a person now living cannot, in legal strictness, be considered as certain to take place speedily. The inquiry, too, into the facts, in such a case, would be objectionable on

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(a) In C. P. 2 *Wils.* 174.; affirmed on error in K. B., *The Bishop of Lincoln v. Wolferstan*, 3 *Bur.* 1504. S. C. 1 *W. Bl.* 490.

(b) 1 *B. & Ad.* 538.

(c) 2 *B. & C.* 635.

(d) *Winch*, 63.

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many accounts. But, here, the power to present is actually in the patron at the time of the sale. [*Parke B.* Suppose there had been no sale, and the patron had died after the acceptance of the second living: who would have had the right to present to the first living?] The executors of the patron. [*Tindal C. J.* There is this difficulty. You say the living was only voidable: now, if the sale does not pass the power of next presentation, who is to appoint? If the vendor cannot, because he has parted with his right, nor the vendee, because the sale is void as to the next presentation, is the incumbent of *Cowsby* to retain his living?] If *Cowsby* had been of the value of 8*l.* the same difficulty might have been suggested; yet there, under the statute and according to the authorities, the sale would clearly not have passed the next presentation. It seems that the right would, in each case, lapse to the bishop or the crown, inasmuch as neither vendor nor vendee could present, the former being estopped by his own deed, and the latter being incapable of making title through a void bargain. That appears to have been the view taken by a part of the Court below. [*Parke B.* If a tenant in fee simple sell his fee, the arrears of rent due at the time of the sale do not pass, but he may still sue for them.] That is because the right to the rent has become a chose in action: but, as before shewn, that is not the principle here, the objection resting on grounds of public policy. [*Parke B.* I think that may be questioned, since the decision of *Fox v. The Bishop of Chester* (a). *Bosanquet J.* You say that there must necessarily be a six months' vacancy from deprivation,

(a) 6 Bing. 1., in *Dom. Proc.*, reversing *Fox v. The Bishop of Chester* in K. B., 2 B. & C. 635.

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and that then the bishop may present. *Tindal C. J.* Then to whom is the bishop to give notice? Are you not making a new law altogether?] The case is itself new: but it should seem that, as there is no patron having the right to present, no notice at all is necessary. It may be like any other case of disqualification of the patron, as, for instance, where the patron is an alien. The presentation may, perhaps, go to the crown at once. But it is not necessary for the plaintiff's case to shew that the vendor can no longer present. The plaintiff is entitled to the tithes, unless the vendee's presentee be the incumbent; consequently it is sufficient for him to shew that the sale passed no power of presenting to this turn. Therefore, even if the objection to the sale passing a void presentation rest merely upon the analogy of such a presentation to a chose in action, the result would still be that the plaintiff must recover the right to present remaining in the vendor.

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Tomlinson contra. The plaintiff in error must contend that, if a manor be sold with an advowson appurtenant (the living being under 8*l.*), and it be afterwards discovered that, without the knowledge of the vendee, the incumbent had accepted a second living before the sale, the vendee has made a simoniacal contract. And the consequence will be that the incumbent cannot be removed from the living, thus taking advantage of a deed to which he is not party, or else that either the vendor, or the bishop, may at any time (for instance, when the incumbent is known to be in extremis) obtain the next presentation. It is impossible to support a principle leading to such results. The defendant is at liberty to question the present title of the plaintiff, as a tenant

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tenant may pay rent to a party to whom his landlord has mortgaged before the tenancy commenced; *Pope v. Biggs* (a). Here the living was voidable only, as is admitted on the other side, although the language of the books is not uniform. Thus, in *Halton v. Cove* (b), Lord *Tenterden* says that "the living, although voidable, and perhaps actually void, yet was not in fact vacant, the rector continuing still in possession," though there had been, in that case, an acceptance of a second living (the first being under the value of 8*l.*) by the rector. Yet it is clear that he meant only that the living was void at the option of the patron, which is the language often used. So, in *Holland's Case* (c), it is said that, before stat. 21 *H.* 8. c. 13., the acceptance of a second living made the first void by canon law; yet that, without notice, no lapse incurred against the patron, as on deprivation, though he might present if he would. This shews that, until the patron acts, or deprivation takes place, the living is in fact full of the first incumbent. That this is the construction to be put on the language of the books appears by comparing the *Anonymous Case* in *Godbolt*, pl. 33. (d), 2 *Rol. Abr.* 360, *Presentment* (L), *Digby's Case* (e), *Winchcombe v. Bishop of Winchester* (g), Note z to 2 *Gibson's Codex*, 906, tit. xxxvii. cap. 1 (h). *Betham v. Gregg* (i) is distinguishable. There the incumbent, who accepted the second living, was him-

(a) 9 *B.* & *C.* 245.(b) 1 *B.* & *Ad.* 558.(c) 4 *Rep.* 75 a. *S. C.* as *Armiger v. Holland, Moore*, 542. *Cro. Eliz.* 601.(d) *Godb.* 23.(e) 4 *Rep.* 78 b.(g) *Hob.* 165, 193. (5th ed.).(h) 2d ed. On this point, *Shute v. Higden*, 2 (*T.*) *Jones*, 18. was also cited in the argument in *K. B.*(i) 10 *Bing.* 352.

self

self also patron of the first, and presented a clerk; and it was held that, inasmuch as the patron had himself treated the living as vacant by his own acceptance of the second living, it was void as against him from the time of such acceptance, and that the right of the new presentee to the tithes, under stat. 28 H. 8. c. 11. s. 3., accrued from the time of that acceptance. There *Tindal* C. J. said (pp. 358, 9) that, in the case of the first living being under 8*l.*, and the incumbent and patron distinct (which is the present case), "notwithstanding the acceptance of the second benefice, the first benefice is full, as to strangers, until deprivation." And that is the effect of the decision in *Halton v. Cove* (a), where the first incumbent was held to be entitled to the tithes until his death, resignation, or deprivation, unless dispossessed de facto, though a new clerk had been presented. It is contended that if the patron had died without selling the advowson his executor would have presented; but, until actual vacancy, the presentation is not a fruit fallen, within the principle of *Rennell v. The Bishop of Lincoln* (b), and the authorities there cited (p. 118—120) for the plaintiff. The judgment of the three judges who decided for the plaintiff, which was afterwards affirmed in the House of Lords (c), confined itself to the case of a living actually void. Here, therefore, in the case supposed, the presentation would go to the heir; and, if so, it would pass by a devise of the realty, or by a covenant to stand seised, and, in short, might be the subject of purchase and sale, as in any other case of a living actually

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(a) 1 B. & Ad. 538.

(b) 7 B. & C. 113., in error from C. P., reversing S. C. 3 Bing. 223.

(c) *Mirehouse v. Rennell*, 8 Bing. 490.

full

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full. Suppose the first incumbent had died, or had resigned or been deprived after the conveyance, could it be said that the first patron, or, upon his death, his executor, would have had the next turn? Yet that is substantially the same case as the present; for the next turn is no more than the right to present when the vacancy actually occurs. [*Parke B.* In strictness, it is not a next turn that is held not to pass by the conveyance, but a turn to a living void at the time; and *Mr. Wightman's* argument is that, for this purpose, a living which the patron can render void immediately is in the same predicament as a living void at the time.] If that were so, the death, resignation, or deprivation of the incumbent would make no difference; so that, in effect, there would be a reservation in the conveyance of the next turn. The innocent purchaser would be hardly treated. The doctrine that a presentation to a void living is a chose in action appears not to be insisted on; and public policy was considered not a sufficient ground for extending the law by analogy, in *Fox v. The Bishop of Chester* (a). (He was then stopped by the Court.)

Wightman in reply. The living would be properly described as void for the benefit of the patron, but not for the benefit of strangers. In *Holland's Case* (b) it was said that "no lapse incurred without notice, as upon deprivation or resignation, and yet the patron might present, and take upon him notice if he would; so that for the benefit of the patron the church is void in the

(a) 6 Bing. 1., in *Dom. Proc.*, reversing *Fox v. The Bishop of Chester* in K. B., 2 B. & C. 635.

(b) 4 Rep. 75 b.

principal

principal case, but not for his disadvantage." That carries the doctrine to the full length contended for by the plaintiff here; for it shews that, as between the vendor and vendee here, the conveyance was of an advowson with a church void. [*Tindal* C. J. That is, void if the patron choose to present.] He is, indeed, not bound to present; but that might be said in every case of a void church. The presentation is "ad ecclesiam jam vacantem," as said in *Wolferstan v. The Bishop of Lincoln* (a), citing *Rex v. Priest* (b). The argument as to the presentation not being a fruit fallen, and so passing to the heir, rests upon an assumption of the whole question. It is not necessary to insist upon the right which other parties might have to institute ecclesiastical proceedings for deprivation. If the vendee here purchased innocently, he had in view only the right to present upon death or resignation; but now he seeks to avail himself of a right to present actually existing at the time of the purchase.

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Cur. adv. vult.

TINDAL C. J. now delivered the judgment of the Court.

(After stating the pleadings and the special verdict, his Lordship proceeded as follows.) It is to be observed that this special verdict does not find that the plaintiff was presented to the living of *Cowsby* by his brother *Justinian*; nor that he was presented to that of *Odell* by the same brother; nor that the patron had knowledge of the institution or induction of the plaintiff to the second living, at the time he conveyed the advow-

(a) 2 *Wils.* 194.(b) 1 (*Wm.*) *Jones*, 337.

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son to Mr. *Lloyd*. The questions, therefore, which arise on this record are two; first, whether, after an incumbent of a benefice under value has accepted and been instituted and inducted to another benefice with cure of souls, the right of presentation, which accrues thereby to the patron, be assignable by law to another? and, secondly, whether the want of knowledge on the part of the patron of the fact of cession, at the time of such transfer, causes any difference? That the *advowson* itself was assignable there is no doubt; but, if the right of presentation was not, under these circumstances, assignable, then it follows that Mr. *Lloyd* had no right to present his clerk, and that the plaintiff in error, not having been deprived, and no new clerk having been presented, is still the incumbent, and still legally intitled to the tithes; 2 *Roll. Abr.* 361. pl. 6. (a); *Watson's Clerg. L. ch. 2.* pp. 7, 8.; *Com. Dig. Eglise*, (N. 5.); and the concluding part of the judgment in *Halton v. Cove* (b).

And, upon a careful consideration of the authorities, we are compelled to come to the conclusion that the judgment of the Court of King's Bench is erroneous.

There is no question but that, if a benefice be actually void, by the death of an incumbent, by his resignation, or by cession, under 21 *Hen. 8. c. 13.*, or by deprivation (*Leak v. The Bishop of Coventry* (c)), the right to present upon that avoidance is not capable of being transferred, either alone, or with the entire *advowson*: it is a personal right or interest, severed from the *advowson* and vested in the person of him who was patron at the time; a chose in action, which is not

(a) *Presentment*, L.(b) 1 *B. & Ad.* 559.(c) *Cro. Eliz.* 811.

assignable,

assignable, and which is designated in the books by a great variety of names, all indicating its personal and unalienable quality. (See those collected in *Mirehouse v. Rennell* (a)).

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The question then is, whether the right to present, caused by the cession in this case, was a chattel disannexed from the advowson, and vested in the person of Mr. *Justinian Alston*, before the transfer to Mr. *Lloyd*, or not? If it was, it could not be assigned.

There is no doubt but that this right of presentation accrued by the canon law, namely, by the fourth council of *Lateran*; but it is equally clear, that this canon has been recognised in this country, and has become a part of the common law of the land (*Holland's Case* (b), *Digby's Case* (c), *Evans v. Ascough* (d)). The point to be decided is, What is the nature of the right given by that canon to the patron? Is it an immediate *right* of presentation in the then patron, when he chooses to exercise it, without doing any thing previously to avoid the interest of the then incumbent; or is it only a right to avoid that interest, by some act, and *then* to present; or to avoid it by the act of presentation only, per se, such interest of the incumbent being valid, and the church full, as to the patron, in the meantime? If the former be the true answer, then we conceive such right is, like every other vested and complete right of presentation, a personal thing, and incapable of transfer. If the latter, then it is probable that the right would pass with the advowson to the new patron.

(a) 8 Bing. 518.

(b) 4 Rep. 75 a. S. C. as *Armiger v. Holland*, Moore, 542. Cro. Eliz. 601.

(c) 4 Rep. 78 b.

(d) *Latch*, 243.

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Now, although the books use some variety of expression on this subject (in some cases the benefice being said to be "void;" in others, "void as to the patron for his benefit;" in some, "to be void at his election;" and in others, but of a comparatively recent date, "to be voidable"), yet in none is it intimated that the patron has not an immediate right to present, as to a void church, *without doing any further act* in order to make such presentation valid. And the substance of the authorities is, that he has a complete right to present upon the cession, by institution to the second benefice, but does not lose his right by *lapse*, till sentence of deprivation and notice by the bishop, from which time the six months begin to run.

It may be advisable to take a short review of these authorities.

The fourth council of *Lateran* is to this effect:—"Quicumque receperit aliquod beneficium curam habens animarum annexam, si priùs tale beneficium habebat, *eo sit, ipso jure, privatus*; et si fortè illud retinere contenderit, etiam alio spoliatur. *Is quoque ad quem prioris spectat donatio, illud post receptionem alterius liberè conferat, cui meritò viderit conferendum*" (a).

The fair construction of the words of this canon is, that, upon acceptance of the second benefice, the clerk should be deprived of the first, by the *law itself*, "*jure ipso*," without any actual sentence of deprivation; and the patron may then freely present a clerk without any other act to be done, as on a deprivation. The constitution itself (it will be seen afterwards) operates in the nature of a general sentence of deprivation. And that

(a) Note (a) to 2 *Gibson's Codex*, p. 904. tit. xxxvii. ch. 1. (2d ed.)

this

this is the true construction of the canon is confirmed by many authorities. One of the earliest cases on this subject is *Holland's Case (a)*, in which the Court held the benefice to be "void," not "by the common law, but by the constitution of the Pope, of which avoidance the patron might take notice if he would, *and might present if he would* without any deprivation; but because the avoidance accrued by the ecclesiastical law, no lapse incurred without notice, as upon deprivation or resignation, and yet the patron might present, and take upon him notice if he would; so that for the benefit of the patron *the church is void*," "but not for his disadvantage." In the report of the same case in *Moore (b)*, the first benefice is said to be "void" "by the common law," "without sentence declaratory, at the *election* of the patron;" which really means the same thing, and is so explained by the context, "that he may, if he will, present without notice." There is no intimation, in this or any other case, that any act of the patron is necessary to avoid the benefice before presentation. In the report in *Croke (c)*, the first benefice is said to be "void by the order of the common law." In *Digby's Case (d)* Popham C. J., and the whole Court, state that the first is *void* by institution to the second, without deprivation or sentence declaratory; yet no lapse shall incur, *unless notice be given to the patron*, no more than if the church became void by resignation or deprivation; and yet the patron may take notice if he will, and present according to the said constitution. In *Rex v. The Archbishop of Canterbury (e)* the church is said to be "void. But not so that

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(a) 4 Rep. 75 a.

(b) *Armiger v. Holland, Moore*, 542.(c) *Armiger v. Holland, Cro. Eliz.* 601.

(d) 4 Rep. 79 b.

(e) *Hetley*, 125.

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the lapse incurred." So in *Fitzh. N. B.* 34, the first benefice is said to be "void." In *Edes v. The Bishop of Oxford* (a) it is also said to be "void." In *Winchcombe v. Bishop of Winchester* (b) it is said, "a thing may be void or not void, at the election of him whom it concerns, as in *Holland's Case*." "The patron of the first church may take it as void, and present presently, or may leave it as full till sentence of deprivation." It is remarkable that there the church is not said to be full. In the case in *Sir William Jones* (reported also in *Croke*), *Rex v. Priest* (c), the law is laid down to the like effect as in *Holland* (d) and *Digby's* (e) *Cases*, and a very clear explanation given of the council of *Lateran*. It is said to have been held, first, by the greater part of the justices, that before the statute of 21 *H.* 8. the first church was *void*, and the patron could present, if he would, without sentence declaratory, by the said constitution of *Lateran*; for the words are, *ipso jure sit privatus*, and do not mention any sentence of deprivation; by the same canon, a church shall be void, without sentence, if one be consecrated bishop, so for the same reason, and by the same words, the first benefice shall be void by the taking of the second benefice; if a party resign, or be deprived by a particular sentence for crime, the church shall be void, and à multò fortiori, the constitution (which is a general sentence of deprivation, as is said 10 *Ed.* 3. 2. (g)) will make an avoidance; but true it is that, in the said case, the patron is not bound

(a) *Vaughan*, 21.(b) *Hob.* 166. (5th ed.)(c) 1 *Jones*, 337. *S. C.*, as *Rex v. The Archbishop of Canterbury and Pryst*, *Cro. Car.* 356.(d) 4 *Rep.* 75 a. *S. C.* as *Armiger v. Holland*, *Moore*, 542. *Cro. Eliz.* 601.(e) 4 *Rep.* 79 b.(g) The reference seems to be to *Rex v. The Bishop of Norwich*, *Yearb. Hil.* 10 *Ed.* 3. pl. 3. fol. 1 A.

to

to take notice of it, being an ecclesiastical constitution, so, upon a particular deprivation or resignation, notice ought to be given to the patron, otherwise no lapse; yet there *is an avoidance*. And it was agreed on the other part, according to the said cases, that the patron can present, if he will, without notice or sentence declaratory; and that could not be, unless the church was *void* before the presentation, for the form of presentation is, “ad ecclesiam jam vacantem,” which presupposes vacancy before the presentation.

In *Rex v. Bishop of London* (a) it was resolved by all the four Judges that, where the first living was under value, the acceptance of a second was an avoidance by the canon law, ipso jure, without any deprivation, so that the patron could present, if he wished, without any sentence of deprivation; and, the church being once void, as to the patron to present, a dispensation by the archbishop afterwards came too late, and could not restore the clerk to his benefice; and *Jones* says it seemed to him clearly that, by the institution and induction to the second benefice, the first being under value, the first benefice was *void*, as well as if it was above value; but the difference in the last case is, that the patron must take notice at his peril, for it is void by the act of parliament, and the words are, it shall be void as if the incumbent were dead; and, if he does not present in six months, the living will lapse. But in the first case there was no lapse, and the patron might present. And he also gave his opinion, that, if the bishop give notice to the patron of the taking of the second benefice, if he do not present within six months, there

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(a) 1 (*Wm.*) *Jones*, 404.

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would be a lapse, as upon deprivation or resignation ; and, if the benefice was not void, but there ought to be a deprivation, then the presentment and institution upon that would be a void institution ; which is not so, for the first institution and incumbency is made void by taking the second benefice.

And the case of *Leak v. The Bishop of Coventry* (a) has a very important bearing upon the question now under discussion, for it is a direct authority that, where the bishop, after deprivation, but without giving notice of such deprivation, collated, and the patron afterwards grants the advowson in fee, and the clerk collated by the bishop dies, *the grantee* of the advowson cannot bring a *quare impedit* : and the reason given is that, when the original patron had right to present upon the deprivation, as in his turn, although the collation by the bishop, without notice, was not good, nor ousted him, but that he always might have presented, and ousted the incumbent by his bringing a *quare impedit*, *yet it is but a thing in action*, and when he hath granted the advowson over, the grantee cannot have this thing in action.

It is only in more modern times, we believe, that the benefice is said to be “voidable.” In 2 *Gibson’s Codex*, 906, in a note (b), it is said to be “voidable ;” but that word is used as an explanation of the former part of the note. In the very modern cases of *Betham v. Gregg* (c) and *Apperley v. Bishop of Hereford* (d), the word “voidable” is used. In *Halton v. Cove* (e) the

(a) *Cro. Eliz.* 811.

(b) Vol. 2. tit. xxxvii. ch. 1. note z. (2d ed.)

(c) 10 *Bing.* 352, 359.(d) 9 *Bing.* 686.(e) 1 *B. & Ad.* 558.

word "voidable" is coupled with the words "perhaps actually void." We do not, however, understand that, by the use of this word "voidable," it is intended that any previous step is necessary before the patron presents; for there is no authority whatever for such a position. It means merely that, if the patron does not elect to present, the incumbent may hold the living: it does not mean that the living is full as against the patron, in the mean time.

It cannot well be that the living is full as relates to the patron, and that the presentation itself determines the interest of the clerk; because it is clear that the presentation must be *when* the church is already *void*, and proceeds upon that assumption. An authority for this position has been before cited; and Lord *Coke*, in *Harris v. Austen* (a), citing *Smale's Case*, 17 Ed. 3. 59 (b), distinctly says, the church ought to be void before he can present; for, if the church be voidable, no presentation can be made. *Rud v. The Bishop of Lincoln* (c) is another authority that the right to present implies that the church is then *void*.

The result of all these authorities is that, upon institution to the second living, the first is void *as to the patron*, but not so as to incur a lapse without sentence of deprivation and notice by the ordinary, or, at least, until notice by the ordinary; and, if void as to him, he cannot deal with the fallen right of presentation at all: it is a personal inalienable right.

The second question, whether the want of a notice of the cession makes any difference, is readily disposed of. If the right to the fallen presentation *be* a personal

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(a) 1 *Rol. R.* 213.(b) *Yearb. Mich.* 17 Ed. 3. f. 59 B. pl. 59.(c) *Hutton*, 66.

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right, disannexed from the advowson, it is clear that want of knowledge of the vacancy by the patron cannot alter the quality of that right : it cannot make a *personal* thing *real* : it will not reannex it to the advowson, any more than want of notice of rent being in arrear (which bears the closest analogy to the subject-matter under consideration) would enable the vendor of a reversion to transfer the rent in arrear with the reversion. The only point of view in which it could be important is with reference to the rights of the grantee of the advowson, as against the grantor, arising out of their contract.

For these reasons we are all of opinion that the judgment of the Court of King's Bench should be reversed.

Judgment reversed.

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IN THE EXCHEQUER CHAMBER.

Tuesday,
June 13th.

(Error from the King's Bench.)

WRIGHT *against* DOE dem. SANDFORD TATHAM.

EJECTMENT for the manors of *Hornby* and *Tatham* (containing respectively certain lands, which were described), for the rectory, &c., of *Hornby*, and for other lands and premises, all in the county of *Lancaster*. The lessor of the plaintiff below claimed as heir at law, the defendant below as devisee, of *John Marsden*. The material questions were, whether the will had in fact been executed, and whether, assuming the execution to be proved, *John Marsden* was, at the time, competent, in point of understanding, to make the will.

On an issue raising the question whether or not a testator had, during any part of his life, possessed ordinary powers of understanding, letters were produced in evidence, written at various periods, and sent to the testator by persons acquainted with him, and since deceased,

in which the writers addressed him as an intelligent man: Held, by the Court of King's Bench, that such letters were not admissible unless connected in evidence with some act done by the testator.

Where improper evidence is received, and a verdict given for the party adducing it, the Court will grant a new trial, although there be other evidence to the same point in favour of the same party; unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence: Held, by the Court of K. B.

Three letters, produced as above, were found in a cupboard in the testator's private room, after his death, with the seals broken, among other letters, some of which (but not these) had been answered, and some (but not these) indorsed by him. The three letters were as follows:

1. A letter of friendship from *T.*, a relation of the testator abroad. The testator was proved to have sent a letter to *T.* three years afterwards, alluding to some intermediate correspondence between them, but not to *T.*'s first letter.

2. A letter from *O. M.* advising the testator to direct that his attorney should take steps in a transaction with a certain parish. This letter was indorsed, in the hand-writing of the testator's then attorney, since dead, with the date, and a memorandum that it was a letter from *O. M.* to the testator.

3. A letter of gratitude to the testator from *E.*, a clergyman to whom he had formerly given preferment.

The testator died in 1826, aged sixty-eight. The three letters were dated respectively 1784, 1786, 1799.

Held, in the Exchequer Chamber, by *Coltman* and *Bosanquet* Js., and *Parke* B., that none of these letters were admissible as connected by evidence with any act of the testator. By *Gurney* B. and *Park* J. that all three were so admissible. By *Tindal* C. J. that letter 2. was so admissible; but not letters 1. and 3. By the whole Court, that, unless so connected, the letters were not admissible as either declarations or acts of the writers.

This

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This ejectment was first tried, before *Gurney B.*, at the *Lancaster* Spring assizes, 1833 (*a*), when a verdict was found for the plaintiff below. A bill of exceptions having been tendered, and error brought in the Exchequer Chamber, the Court of error awarded a venire de novo (*b*). The cause was again tried, before *Gurney B.*, at the *Lancaster* assizes, *August* 1834. The execution of the will was proved by producing the nisi prius record of the trial in 1830, with the postea indorsed, and a short-hand writer's note of the evidence given on that trial by the attesting witness *Bleasdale*, who was since dead. It appeared that another attesting witness was living, who was not called. The mode of proof was objected to on behalf of the plaintiff. On the question of competency, evidence was given of the testator's habits and state of intellect, from his boyhood to the last years of his life (*c*). He was born in 1758, and died in 1826. The witnesses for the defendant, whose case was first proved, represented Mr. *Marsden* to have been a man not of strong mind, but of understanding adequate to the making of a will, having a tenacious

(*a*) A former trial had taken place on feigned issues raising the same questions. The heir at law, Admiral *Tatham* (the now lessor of the plaintiff below), filed a bill in Chancery, praying that the will might be declared to have been obtained by fraud and undue influence, and to be void. The Court directed issues of *devisavit vel non*, which were tried before *Park J.* at the Spring assizes, 1830, at *York* (on account of the prejudice supposed to prevail in *Lancashire*), and a verdict was found in favour of the will. A new trial was moved for before Sir *John Leach M. R.*, and refused. The like motion was then made before Lord *Brougham C.*, and argued before his Lordship, assisted by *Tindal C. J.*, and Lord *Lyndhurst C. B.* Judgment was delivered, *June* 11th, 1831, refusing the new trial. *Tatham v. Wright*, 2 *Russ. & Mylne*, 1.

(*b*) *Wright v. Doe dem. Tatham*, 1 *A. & E.* 3.

(*c*) See the outline of the case on each side on the trial in 1830, given by *Tindal C. J.* in *Tatham v. Wright*, 2 *Russ. & Mylne*, 19.

memory,

memory, enjoying the amusements usual among men of his station in life, keeping up a large acquaintance, and entertaining at his house persons of equal and superior rank to his own, who were pleased with his reception of them, and with his manners, which were courteous and gentlemanly. Evidence was adduced that he wrote numerous letters, and executed many deeds, which were attested by persons of undoubted character; and the defendant's counsel put in several letters written and sent by different persons to Mr. *Marsden*, addressing him as a man of good understanding. The nature of these will be more fully stated hereafter. The evidence for the plaintiff also ran through the greater part of Mr. *Marsden's* life. The witnesses represented him as having been, from his boyhood, extremely weak in understanding, and, at seventeen or eighteen years of age, not more intelligent than a child of eight. It was sworn that, after he attained manhood, he was unable to count beyond a very small number, and ignorant of the commonest natural occurrences; that he was incapable of conducting business, and used to ask childish questions on the most familiar subjects relating to his own property; that he was subject to irrational fears, insomuch that he had sought the protection of other persons when passing by a pig or a turkey-cock; that he displayed the same imbecility in his amusements, had been seen playing in a ridiculous manner in company with an idiot, and used to shew an absurd fondness at the sight of a woman's checked apron. It was also stated that *Wright*, the defendant in K. B., who had risen from a menial station, and was ultimately Mr. *Marsden's* steward, exercised an absolute control over him, directed him in his transactions, and kept him in awe when *Marsden* and he were in the society of other persons. It was suggested,

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suggested, and some evidence was offered to shew, that letters of *Marsden* had been dictated or corrected by *Wright*. Many instances were given of the treatment which *Marsden* received from *Wright* and from others. It was stated that *Wright* had been accustomed to treat him with great harshness and disrespect, and had even used personal violence to him; that he had, in *Marsden's* presence, reproved a servant of *Marsden's* for asking directions from him; that *Marsden* was treated as a child by his own menial servants; that, in his youth, he was called, in the village where he lived, "Silly Jack," and "Silly *Marsden*," and was never talked to "as a man that was capable of any thing, but as a child;" that a witness had seen boys shouting after him, "There goes crazy *Marsden*," and throwing dirt at him, and had persuaded a person passing by to see him home; and that once, when *Marsden* passed the evening at a gentleman's house, in company with Mr. *Ellershaw* (the writer of a letter to which reference will be made hereafter), the elder persons of the family sat down to whist, and, *Ellershaw* mentioning that *Marsden* was unable to play, some children were sent for, and he was put to play with them at loo, at a side table, a man-servant superintending the game.

The defendant's case on this trial, as to the letters received by *Marsden* and now offered in evidence, and the admissibility of which the plaintiff below contested, was as follows. All of them were from persons since dead. They were found, with many other papers, in a cupboard under a book-case, in the library at *Hornby Castle*, Mr. *Marsden's* residence; the room was called his, and used by him. It did not appear when they were placed there, nor how soon they were found after *Marsden's* death. They had been opened; but it was
 not

not proved that any answers had been returned, or the contents of the letters in any way acted upon. Answers, however, had been given to other letters found in the same repository. The letters now in question were produced at the trial, to shew how *Marsden* was treated by persons well acquainted with him. The evidence was objected to on behalf of the plaintiff; but *Gurney B.*, who had held it inadmissible on the former trial of this cause, now said that, in consequence of a difference of opinion among the judges (a), he should allow the letters to be put in, subject to the objection. They were accordingly read. The following were those particularly commented upon in the ensuing argument in the Court of King's Bench.

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I. From *Charles Tatham*, Mr. *Marsden*'s cousin, who, at the time of writing, was in *America*.

“ My Dear Cousin. You should have been the first person in the world I would have wrote too had nt. my time been Employd by affairs that called for my more imeadeate atention in the first place I am calld upon by my Buseness it being the first consideration must by no means be neglected. As for my Brother his goodness is Such that I know he will Excuse me till I am more disengaged was I to write to him in my present Embarased situation I might perhaps only do justice to my own feelings & he might construe it deceit (so different an oppinion have I of him to Mankind in Genl. who above all things are fond of Flattery. I shall now proceed to give you a small Idea of what has passd. since my Departiure from Whitehaven as I supose Harry long ere now has told you the rest. We saild the 14th, *July* & had Good Weather the Chief of the Way

(a) See *Wright v. Doe dem. Tatham*, 1 A. & E. 3.

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but as you know nothing of Sea fareing matters it is not worth While to Dwell upon the Subject. We Reachd. the Cape of Verginia the 13th *Sepr.* but did not get heare till the begining of the present Month so we were about twenty Days in coming 350 Miles. When I arivd. I was no little consirned to find the Town in a Most Shocking Condition the People Dieing from 5 to 10 per day & scarsely a Single House in Town cleare of Descease which proves to be the Putrid Fevour — I am going to Philadilphia in a few days if God Spares my Life and permits me my Health & their I intend to stay till Affairs here bare a more friendly Aspect & so the Next time you here from me will be I expect from that Place tho' Youl Please to direct to me heare as Usual. God Bless You my Dear Cousin and may You still be Blessd with health which is one of the greatest Blessings we require hear is the sinseare wish of Dr Cosn, Your

Affect. Kinsman & verry Humble Servt.

“ Cha. Tatham.

“ P. S. Pray give my kind Love to my Aunt My Brother & My Cousin Betty allso my Complements to all the rest of the Family and all others my former Aquintances, &c.

“ Alexandria, 12th Octr. 1784 ”

Addressed *“ John Marsden Esquire Wennington Hall, Lancaster.”*

II. From the Rev. *Oliver Marton*, Vicar of *Lancaster*.

“ Dear Sir.—I beg that you will Order your Attorney to Wait on Mr. *Atkinson*, or Mr. *Watkinson*, & propose some Terms of Agreement between You and the Parish or Township or disagreeable things must unavoidably happen. I recommend that a Case should be settled by

by Your and their Attorneys, & laid before Council to whose Opinion both Sides should submit otherwise it will be attended with much Trouble and Expence to both Parties. I am, Sr. with compliments to Mrs. Coockson, Your Humble Servant &c.

"May ye 20th 1786 *Oliver Marton.*

"I beg the favour of an Answer to this.

"*John Marsden, Esq. Wennington.*"

III. From the Rev. *Henry Ellershaw*, on resigning the perpetual curacy of *Hornby*, to which Mr. *Marsden* had appointed him.

"Dear Sir. — I should ill discharge the obligation I feel myself under, if, in relinquishing *Hornby*, I did not offer you my most grateful acknowledgments for the abundant favours of your Hospitality and Beneficence. Gratitude is all that I am able to give you, and I am happily confident that it is all that you expect; I have only therefore to assure you, that no Circumstances in this World will ever obliterate from my Heart and Soul the remembrance of your benevolent Politeness. May the good Almighty long bless you with Health and Happiness; and when his Providence shall terminate your Xtian Warfare upon Earth, may the Angels of the Lord welcome you into Blessedness everlasting. It will afford me Pleasure to continue my Services during the Vacancy, if agreeable to you. With every sentiment of Respect and Affection to yourself and the worthy family at the Castle, I hope you will ever find me, Your grateful, faithful & obliged Servt

"Chapel le dale *Henry Ellershaw*

"3d Oct: 1799 — Please to deliver the Inclosed to Mr *Wright.*"

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IV. and V. From Mr. *James Barrow*, who had been some time solicitor to Mr. *Marsden* before 1789, when the letters were supposed to have been written.

“Dear Sir. I am desired to inform you that a meeting is intended to be held tomorrow morning at the *Grapes* at 11 o’Clock in order to take into Consideration a Letter reced from Lord *Lonsdale* when I presume an Ansr. will be thot proper to be given to it Shod. it be convenient for yourself and Mr. *Wright* to attend your Presence would give additional consequence and be much wished for as what is done ought to be with the advice and Approbation of every Gentleman who has any interest and especially of those whose Interest is great. — I am Dr Sir, with best compts, most respectfully yrs

“Monday 30th Nov

Jas Barrow.

“To John Marsden Esq. *Wennington Hall*”

“Dear Sir. A meeting of friends is fixed to be held tomorrow morning at 11 o’Clock when your presence is particularly wished for with that of Mr. *Wright* and any other Gentleman you may think proper It is meant to be a party meeting in order to consider what is proper for us as a party to do preparatory to a Public Meeting which is intended within a few days — Our friend *Cawthorne* means to be here early

“I much wish also to see Mr. *Wright* about many things

“I am D Sir very sincerely and respectfully yrs

“John Marsden Esq

Jas Barrow”

VI. From

VI. From Mr. *Bickersteth*, surgeon, of *Kirkby Lonsdale*, seven miles from *Hornby*.

"Dear Sir.—On mentioning to Mr. *Dobson* that you said you would have the goodness to come to *Kirkby* tomorrow to serve him provided he thought there was any occasion for your coming.—As I find that his opponent in this business is making all the interest he can, Mr. *Dobson* thinks it necessary to request the attendance of all his friends on the occasion I have sent you the act of Parliament to let you see you are a Trustee and by qualifying, you need have no fear of their troubling you on other business—You were appointed as Mr. *Dobson* has put down in the place of your Brother I am sorry to inform you that the meeting is appointed at so early an hour as ten o'clock tomorrow Morning.

"I hope you will let me have the pleasure of your Company to a family Dinner, & if Mr. *Wright* can accompany you I shall be very glad to see him. I am Dear Sir very sincerely Yours &c.

"*H. Bickersteth.*

"*K. Lonsdale Wednesday Morning.*"

The jury found a verdict for the defendant (*a*). In *Michaelmas* term, 1834, Sir *James Scarlett* moved for a new trial on several grounds; one of which was the reception of the above letters. A rule nisi was granted on this point, and on others, which, however, were not afterwards discussed (*b*). In *Hilary* term, 1836,

Sir

(*a*) For a full statement of the evidence and proceedings on this trial see the "Verbatim Report," in two volumes, published in 1834, by Mr. *Alexander Fraser*, of *Clifford's Inn*.

(*b*) One ground of motion was the proof of the execution of *Marsden's* will by a note of *Bleasdale's* evidence in 1830, another attesting witness

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Sir *F. Pollock*, *Atcherley* Serjt., *Wightman*, *Tomlinson*, and *Martin*, shewed cause (a). They argued that, in an inquiry relating to the conduct of the testator throughout his life, evidence of the manner in which he was treated by persons well acquainted with him was relevant, and, upon principle, admissible; that their letters were *res gestæ*; that they were treatment of and conduct towards the testator, and were as properly receivable as the proof, adduced on the plaintiff's part, of the testator having been called "*Silly Marsden*," and pelted by boys. They observed that, if the plaintiff was at liberty to prove that *Marsden* had been treated as a child by persons of whom Mr. *Ellershaw* was one, the defendant also might prove a letter written by *Ellershaw*, in which he was differently treated; and that it made no difference whether the last-mentioned proof was given in answer or by anticipation. They relied especially on those parts of the letters in which *Marsden* was requested to do acts implying a competency to business. And they contended that the evidence now objected to was at least as legitimate as that, which had been admitted without complaint, of attestations made by persons of integrity to the testator's execution of deeds. They cited 1 *Starkie on Evidence*, pp. 57 (b), 58, 59 (c), 63, 64 (d), (2d edition), *Waters v. Howlett* (e), and *Wheeler*

being alive and not called. The Court refused a rule on this point, considering themselves bound by the judgment in the Court of Exchequer Chamber in *Wright v. Doe dem. Tatham*, 1 A. & E. 3, which decision had not been since questioned.

(a) *January* 21st and 22d. Before Lord Denman C. J., *Littledale* and *Coleridge* J^s. See the judgment in K. B., p. 324. post.

(b) Beginning, "From what has been said;" ending, "ordinary life."

(c) Beginning, "Great latitude;" ending, "indirect evidence."

(d) Beginning, "It is however;" ending, "as any other fact is."

(e) 3 *Hagg. Ecc. Rep.* 790; but not as to this point. See *Wright v. Doe dem. Tatham*, 1 A. & E. 8.

v. *Alder-*

v. *Alderson* (a); and, as analogous cases, *Trelawney v. Coleman* (b), where, in an action for criminal conversation, letters of the wife to her husband were held admissible to shew the terms on which they had lived, and *Willis v. Bernard* (c), where, in a like action, the wife's letters to a third person were received for the same purpose. They also observed that the evidence here shewed an act done by the testator with respect to the letters, for that the seals were broken, which raised an inference that he had opened and read them, especially as he had returned answers to other letters found in the same repository.

They further contended that, if the Court should hold the evidence in question inadmissible, the parties ought not on that account to be put to the expense of a new trial, which would only terminate in a bill of exceptions being tendered by one party or the other, as the evidence should be admitted or excluded; and they proposed that the present rule should be discharged, the defendant agreeing that the plaintiff should now stand in the same situation as if a bill of exceptions had been tendered at the trial. It is not a matter of necessity that the Court should grant a new trial because some improper evidence has been received. The opinions expressed by the learned Judges who assisted Lord *Brougham* C. on the motion for a new trial upon the feigned issue (d), entitle the defendant to say that, independently of these letters, the evidence on his side preponderated. It is laid down in 1 *Starkie on Evidence*, 469 (citing several authorities), that "the Court

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(a) 3 *Hagg. Ecc. Rep.* 609.

(b) 1 *B. & Ald.* 90.

(c) 8 *Bing.* 376.

(d) *Tatham v. Wright*, 2 *Russ. & Mylne*, 1.

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will not grant a new trial on the ground of the reception of improper evidence, where there is sufficient evidence without it to warrant the verdict." *Doe dem. Lord Teynham v. Tyler (a)*, and *Horford v. Wilson (b)*, there cited, support that proposition; and in *Tyrwhitt v. Wynne (c)* Abbott C. J. held that the rejection of evidence was no ground for a new trial, unless it were shewn that the evidence, if received, "would have led to a probable conclusion in favour" of the party tendering it.

The Court had, in the course of the argument, desired the counsel for the defendant to confine themselves at present to the question on the letters; and they now stated that they did not think it necessary to hear any argument for the plaintiff on this point, but would give counsel notice if they altered their opinion. *Cresswell, Starkie, and Armstrong*, were to have argued for the plaintiff.

Cur. adv. vult.

Lord DENMAN C. J. in the same term, *February 1st*, delivered the judgment of the Court.

This case rests at present on a single question—that of the admissibility of certain letters tendered on a trial whether the testator was competent to make a will; which the plaintiff denied, alleging his entire natural incapacity. Such an issue opens a wide door for the admission of evidence, as every transaction of the testator's life, every expression he ever used, and his manner of conducting himself in the most ordinary concerns, may have a bearing on the question.

The letters tendered, written at the time of their

(a) 6 Bing. 561.

(b) 1 Taunt. 12.

(c) 2 B. & Ald. 554.

several

several dates, by respectable persons now deceased, who were acquainted with the testator, had been found in his house, with the seals broken, shortly after his death. No other circumstance was proved relating to them : no act of the testator's was shewn to have produced them, or to have followed upon them.

But it has been strongly contended before us, as it was at the trial, and as it has been argued in a former stage of the cause, that the contents of these letters ought to be laid before the jury, as shewing in what manner the testator was treated by the writers; and such treatment, abstracted from all corresponding conduct on his part, was said to be evidence to disprove his alleged imbecility.

Without dispute, any, the least, act done by the testator with reference to the letters would have made them evidence; for such act could not be properly explained without recourse to them: and, if received, no rule of law could have prevented their full effect from being produced on the minds of the jury. An attempt was accordingly made to shew that he had done something with them; for it was said that, as the seals were broken, a presumption arose of his having read them. But this would be a strong presumption, where the testator's imbecility is the very fact in issue; and, even if the presumption is made, as the power to read is not inconsistent with such a character of mind, it is plain that no inference arises from his having read them. He may have thrown them aside when read, from utter incapacity to understand them; and the state in which they were found affords no evidence which makes that hypothesis less probable than any other.

The manner in which a man is treated by persons

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ignorant of his intellectual character would be obviously of no value. But, even if well acquainted with him, their treatment does not prove their opinion. The respectful phrases may be ironical, or employed for the very purpose of circumventing the party addressed, on the presumption of his imbecility. This might be apparent from the language itself to those who knew the habits of the writer. It is no answer to say that such remarks are rather on the effect than the admissibility of the evidence, and fit for the consideration of the jury. We do not think it worth while to observe here that those who produce the letters may be much more reasonably expected to explain them by circumstances, than those against whom they are produced; this may be an observation on their effect, while what has been said appears to us to prove that it must be a matter of complete uncertainty whether these letters, written by strangers to the suit, do or do not express their genuine sentiments.

The learned counsel will, however, remind us that they disclaim the letters as proofs of the opinion of the writers, or of any fact mentioned in them, and that their only object is to shew the treatment which the testator received from other persons. But if it be admitted, — and we think it cannot be denied, — that the letters would prove absolutely nothing if they proceeded from persons unacquainted with the deceased, or if they were insincere and hypocritical, it inevitably follows that their relevancy to the question depends on their representing the real opinion of the writers. Indeed we apprehend that no person can really doubt that this is the only rational view in which they can be considered applicable; and, however ingeniously the proposition

proposition may be wrapt up, we can discover no other principle on which a man of plain common sense could permit the letters to influence his decision of the matter in issue.

Letters written may be said to be an act done; but so likewise are declarations made; and letters without correspondence we cannot distinguish from oral declarations proved to have been made at the same time, and left without an answer. Who does not perceive that declarations would be much more probably true, if made by the party to his own confidential friends, than if addressed to him whose state of mind they are supposed to elucidate? Yet these are admitted on all hands to be no evidence.

The hardship of excluding these letters was powerfully urged, since it was said that letters of a contrary tendency might undoubtedly have been given in evidence, and that the jury were in fact much influenced by the manner in which the testator was treated by children pursuing him in the street like one deprived of reason. But the answer is, that letters of a contrary tendency, tendered under the same circumstances, have never, to our knowledge, been held admissible, nor could be, in our opinion, received. So the insults offered to him as an idiot by boys, when he walked out, are not evidence as the acts of the boys: their treatment of him as such is nothing; but the manner in which he received that treatment falls within the scope of our rule, and may certainly furnish strong proofs in affirmance or refutation of the proposition under inquiry.

The argument for the defendant appears, indeed, to be founded on a fallacious use of the word *treatment*. The behaviour of *A.* to *B.* may, without impropriety of

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language, be called treatment of him, though he be absent or asleep, and wholly unconscious of what is done. *A.* might thus evince his high or mean opinion of *B.*'s understanding and character; but such proof of his opinion is allowed to be no evidence in a court of justice. If such behaviour were observed by *A.* towards *B.* in his presence, and while he was in a state of consciousness, his conduct in return, with reference to the forms of society and to the natural feelings of human nature in similar circumstances, may afford strong evidence of the state of his intellect. In this latter case, the treatment of *B.* by *A.* must be given in evidence, not as treatment, but because *B.*'s conduct thereupon cannot be understood without it. This bears an exact resemblance to letters sent and answered, or dealt with in any way: the former case is that of letters merely written and received, without proof that the party receiving them did any thing in respect to them. Though it can hardly be necessary to guard against misconception in this particular, we may as well observe that our exclusion is only of these letters as independent evidence. If any such had been written by living persons, who came on the trial to give an opinion on the testator's capacity, at variance with that to be collected from their letters, these might have been placed in their hands for the purpose of cross-examination, and, under some circumstances, might have been given in evidence to contradict their statements.

We are not told of any case, before the present, in which evidence of this description has been admitted in our Courts. In the absence of authority, one analogy was thought to come near the principle contended for, — the reception, in an action for criminal conversation,
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of letters written by the wife to the husband at an earlier period. But this evidence stands on a different and clear ground; for letters so written before the separation are part of the conduct pursued by the wife towards her husband, shewing that she treated him with kindness, and that he has been deprived of an affectionate partner.

On questions of this kind at Doctors' Commons, we were informed that the evidence of treatment arising from the letters of third parties has been received. We feel great respect for the authority of Ecclesiastical Courts, and should lament the adoption of inconsistent rules of evidence there and in *Westminster Hall*. But we must observe that the reports of any such decision are not satisfactory, and that they can have no weight without an accurate statement of all particulars. We can easily conceive that, under the general term *treatment*, letters from other persons might be looked at to disprove incapacity; but we can hardly imagine them to be brought forward so wholly stripped of circumstances as not to have proof of something done with them by the testator. Whenever papers of such a description shall be laid before any spiritual Judge in this country, we see no reason to doubt that he will take the same view of their admissibility as that which we are now declaring.

We must by no means omit what passed in the Exchequer Chamber, where this identical question was raised, but not decided, because the judgment on another point rendered it superfluous. There is reason for believing that, of seven Judges who sat in that Court of Error, four thought these letters receivable, and three were of the contrary opinion. It is out of deference to the doubtful state in which the point was
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thus left that we have thought it our duty to reconsider our first impression upon it, and enter fully into our reasons. Whatever may be the ultimate opinions of our learned Brethren, when they fully examine the question with reference to legal principles, and with the sense of judicial responsibility attached to their announcement of them, we are bound to act upon our own clear conviction that the evidence was not by law admissible.

Sir *F. Pollock*, indeed, suggested that we might act upon the example of the Common Pleas in *Doe dem. Lord Teynham v. Tyler (a)*, and might enter upon an inquiry whether, even though this evidence may have been improperly received, there was not proof enough in the cause, without it, to warrant the verdict. But, as this Court has so lately (*b*), on full consideration, and in conformity with a decision of the Court of Exchequer (*c*), renounced the discretion which was in that case exercised, we need not repeat our reasons for holding that, where evidence formally objected to at Nisi Prius is received by the Judge, and is afterwards thought by the Court to be inadmissible, the losing party has a right to a new trial.

This must be considered as the judgment of my Brothers *Littledale* and *Coleridge*, and myself. Our two Brothers, having been engaged in the cause while at the bar, have taken no part in the deliberation. I may, however, mention that, in a similar case, tried before my Brother *Patteson*, at *Wells*, in 1834, he received and rejected letters according to the line which we have drawn.

Rule absolute.

(a) 6 Bing. 561.

(b) *De Rutzen v. Farr*, 4 A. & E. 53.

(c) *Crease v. Barrett*, 1 Cro. M. & R. 919. S. C. 5 Tyr. 458.

The

The cause was again tried before *Coleridge J.*, at the *Lancaster* Summer assizes, 1836. The proof, as to Mr. *Marsden's* habits and intellect, did not materially differ from that given on the preceding trial. The letters from *Charles Tatham*, *Marton*, and *Ellershaw*, above set out, were offered in evidence for the defendant, and rejected by the learned Judge. The execution of the will was proved as on the last trial. Bills of exceptions were tendered by the plaintiff and defendant. The jury found a verdict for the plaintiff. Judgment was signed for the plaintiff in K. B., and a writ of error brought, embodying the bills of exceptions tendered on each side.

The defendant's bill of exceptions stated that, upon the trial of the cause on *August 6th*, 1836, "it became and was a matter in controversy and at issue between the said parties, whether or not the said *John Marsden* was, and had been from his attaining to competent age in the year 1779, and down to and at the time of his making the will and codicil in question, in the years 1822 and 1825 respectively, a person of sane mind and memory, and capable of making a will; and, as evidence to maintain the affirmative" &c., "the counsel for the said defendant proved that, after the death of the said *John Marsden*, many letters addressed to him by various persons were found with other papers in a cupboard under his bookcase in his private room; and that, to many of these letters, letters had been written and sent in answer, which last-mentioned letters were proved to be in the handwriting of, and signed by, the said *John Marsden*; and that, upon some others of the letters so found, there were indorsements in the handwriting of the said *John Marsden*; and which letters so answered and indorsed were tendered and received in evidence upon the

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said matter in controversy and at issue : that amongst the letters so found there was found a letter addressed to the said *John Marsden* by one *Charles Tatham*, the brother of the said *Sandford Tatham* and a cousin of the said *John Marsden*, who was, at the time of the date and writing of the said letter, and for some years after, staying in *America* ; and which letter purported to be dated, *Alexandria*, 12th *October* 1784, and which letter was open, and the seal broken, and of which the following is a copy.” (Then followed a copy of the letter I., set out antè, p. 317.) “ And the counsel for the said defendant further proved that the said letter was marked with the *London* post mark as a ship letter, and was in the handwriting of the said *Charles Tatham*, and addressed to the said *John Marsden*, Esquire, *Wennington Hall*, where the said *John Marsden* then resided ; and it was also proved that the said *Charles Tatham* was personally acquainted with the said *John Marsden*, and had been dead many years : and amongst the said papers of the said *John Marsden* there was found the following draft or copy of a letter from the said *John Marsden* to the said *Charles Tatham*, in the handwriting of the said *John Marsden*.

“ Dear Cousin — I received your Letter some time ago wherein you mentioned that you had sent me a map of the *United States of America* to the care of Mr. *George Welsh* merchant in *Liverpool*. I deferred writing till such times as I had made enquiry after it, but did not get the map till the 7th instant. You mentioned in your Letter that you had sent me a small quantity of dried fruit I received nothing but the map for which I am obliged to you My aunt has had very poor health since you left *England* she has scarce
ever

ever been well. I am in hopes that she is getting better again I think that change of air and a journey would be of service to her We have lately had an account of poor Mrs *Smith's* death, she died at *St. Alban's* the 7th instant. My aunt has had a letter from your brother *Harry*, he is very well. It is reported that your acquaintance Mr. *John Bradshaw* is going to be married to a Miss *Fell* of *Lancaster* whether there is any truth in it or not I cannot tell. I suppose you have received my last letter, wherein you will see an account of your Nurses death. I have nothing further to add but compliments from my Aunt and your Cousin *Betty*. I am, Dear Cousin, your Affectionate Kinsman,
 “ *Wennington Hall June 1. 1787.* *J Marsden*

“ *C Tatham Esq.*”

Which draft or copy of such letter was produced and read in evidence on the part of the defendant. And thereupon the counsel for the defendant proposed and tendered the letter of the said *Charles Tatham* to be admitted and read to the jury as evidence for the defendant upon the said matter so in controversy &c.; but the counsel for the lessor of the plaintiff objected; and the Judge stated his opinion that it was not admissible, and refused to admit it; whereupon the defendant's counsel made his exception, &c., and tendered a bill of exceptions.

The bill of exceptions further stated that, as evidence to maintain the affirmative &c., the defendant's counsel proved that, after the death of the said *John Marsden*, and at the same time and place where the said letter from the said *Charles Tatham* was found, there was found amongst the said letters before mentioned a letter addressed to the said *John Marsden*, at *Wennington* aforesaid,

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aforesaid, where he then resided, by one *Oliver Marton*, and which letter purported to be dated, *May 20th*, 1786, and was open, and the seal of which was broken, and of which the following is a copy." (Then followed a copy of the letter No. II., antè, p. 318.) "And the counsel for the said defendant further proved that the said *Oliver Marton* was, at the date and writing of the said letter, the vicar of *Lancaster*, a town about eleven miles distant from the then residence of the said *John Marsden*; that he was intimately acquainted with the said *John Marsden*, and that he had been dead upwards of thirty years, and that the letter was in his handwriting. And the counsel for the said defendant further proved, that one *James Barrow* was, at the time of the date of the said letter, the attorney of the said *John Marsden*, and had been dead upwards of thirty-five years; and that an indorsement on the back of the said letter, of these words — "*20th May 1786*, letter from Mr. *Marton* to Mr. *Marsden*," was in the handwriting of the said *James Barrow* (a): and thereupon the said counsel for the said defendant proposed and tendered the said letter," &c. (Statement as before, that the evidence was objected to and held inadmissible, exception made, and bill of exceptions tendered, &c.)

"And also, to maintain the affirmative" &c., "the counsel for the said defendant proved that, after the death" of *Marsden*, "and at the same time and place" &c., "there was found, amongst the said letters before mentioned, a letter addressed to the said *John Marsden*, by one *Henry Ellershaw*, which was open, and the seal of which was broken; of which the following is a copy."

(a) This was not proved on the preceding trial.

(Then

(Then followed a copy of the letter, No. III. antè, p. 319.)

“ And the counsel for the said defendant further proved that the said *Henry Ellershaw* had been for several years the curate of the chapelry of *Hornby*, to which he had been appointed by the said *John Marsden*, on ” &c., “ as patron of the said chapelry ; and that he was well acquainted with the said *John Marsden* ; that he had been dead some years ; that the letter was in his handwriting ; and that it had been written by him in the presence of the Rev. *John Garnett*, his assistant, when he, the said *Henry Ellershaw*, was about relinquishing the said preferment. ” (Tender of the evidence, objection, refusal to admit, and exception, stated as before.) The record then proceeded as follows.

“ And, upon the said trial, the matter in controversy and at issue between the said parties in the cause was, whether or not the said *John Marsden* did, by his last will and testament, bearing date the 14th *June* 1822, and by a codicil thereto, bearing date the 23d *February* 1825, devise the manors, advowsons, messuages, lands, and tenements, in the said declaration in ejectment mentioned ; and, as parcel of the said matter so in controversy, and included therein, it was a matter in controversy and at issue between the said parties, whether the said *John Marsden* was, at the time of the execution of the said will and codicil, a person of sane mind and memory, and capable of making the same ; and thereupon, to maintain the affirmative of the said matters so in controversy,” &c. : the record then stated the evidence offered to prove the execution of the will and codicil ; objection taken by the plaintiff’s counsel that they could not be read in evidence till the execution had

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had been proved by the living attesting witness, which was not done; the Judge's decision in favour of the evidence; exception made by plaintiff's counsel; and the admission of the will and codicil as proof of the said matters in controversy. The bill of exceptions was stated to have been signed and sealed by the Judge at the prayer of counsel on each side. The defendant below assigned as special grounds of error the rejection of the above-mentioned letters I., II., and III. The plaintiff below joined in error, but did not assign any errors (a). The case was argued in *Hilary* vacation (*February* 6th), 1836, before *Tindal C. J.*, *Park*, *Gaselee*, and *Bosanquet Js.*, and *Parke* and *Gurney Bs.*

Sir F. Pollock, for the plaintiff in error, the defendant below. First, the question being as to the mental capacity of the testator, all letters addressed to him by persons proved to have known him were evidence as shewing the treatment of him in society. The subjects

(a) The following note was inserted in the margin of the paper-book. "Copies of this and the other letters tendered and rejected are inserted in the bill; but it is agreed that they are to be struck out if the Court shall be of opinion that their insertion is improper; in which case it is to be inserted that the counsel for the defendant stated to the Judge the contents of the letters; and, if the Court shall think fit, he is to be allowed to refer to them in the argument." *Cresswell*, for the plaintiff below, contended, in the course of the ensuing argument, that the letters ought not to continue set forth on the record, because, if their admissibility was put upon the ground that the writing of any such letter was an act done, or a treatment of the testator, the question before the Court of Error, as to that point, could not depend upon the particular contents of the letter; and that the contents could not be put on the record as explanatory of acts, there being none proved which they could explain. It was answered that, if the letters were acts, it was only by the contents of the letter that the Court could know what the act was. *Tindal C. J.* said that the contest was in fact whether the contents of the letters ought to have gone to the jury, and therefore that the Court must look at them.

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on which they communicated with him, and the manner in which they addressed him, are part of such treatment. His whole life was the matter of enquiry; and every fact of his personal history may be considered as part of the *res gestæ*. No instances have been found of decisions as to this kind of evidence in the courts of common law, but in the ecclesiastical courts it is often received. Since the decision of the Court of King's Bench in the present cause, such evidence was admitted by Sir *Herbert Jenner*, Commissary of the Prerogative Court of *Canterbury*, in *Morgan v. Boys* (a), last December; *Doe dem. Tatham v. Wright* (b) was cited there against the reception of the evidence, but without success. The same question arose in the Prerogative Court a few days afterwards, in *Handley v. Jones* (c), where letters to a party since deceased, having been found in his custody, though without any proof of recognition by him, were offered as evidence of treatment, and admitted; Sir *Herbert Jenner* observing that such evidence was always received for that purpose in the ecclesiastical courts. It is usual in those courts to plead that the person whose sanity is in question was treated as a man of sound mind; and letters addressed to him are held legitimate evidence to support such plea, if there be satisfactory proof that the writers knew the testator, and that the letters come from a proper custody. In *Wheeler v. Alderson* (d) and *Waters v. Howlett* (e) such evidence was admitted, though the published report of the latter case does not notice the point.

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(a) Not reported.

(b) *Antè*, p. 314—330.

(c) Not reported.

(d) 3 *Hagg. Ecc. Rep.* 574. See p. 609.(e) 3 *Hagg. Ecc. Rep.* 790. See *Wright v. Doe dem. Tatham*, 1 A. & E. 3.

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There is no reason that the same rule (which is grounded on good sense) should not prevail both in the common law and in the ecclesiastical courts. The general principle, on which evidence like that in question is receivable, may be stated in the language used in 1 *Stark. Ev. (a)* 57. "It seems to follow that all the surrounding facts of a transaction, or as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption or inference as to the question in dispute; for, as has already been observed, so frequent is the failure of evidence, from accident or design, and so great is the temptation to the concealment of truth and misrepresentation of facts, that no competent means of ascertaining the truth can or ought to be neglected by which an individual would be governed, and on which he would act, with a view to his own concerns in ordinary life." And, in p. 58., "The nature of the evidence, and the principles by which it is to be appreciated, are, as has already been observed, to a great extent common to judicial and extrajudicial inquiries. Its force and efficacy, in the one case as well as in the other, must necessarily depend either on the known and ordinary connection between the facts proved and the fact disputed, or on the force and tendency of the facts proved to establish the truth of the disputed fact or issue, by the excluding any other supposition." The question therefore is, whether, in the ordinary course of life, such letters as these would produce any effect whatever on any reasonable mind, as to the point now in issue. Suppose a testator were proved to have received a great number of letters from learned and intelligent persons,

(a) 2d edition.

consulting

consulting him on points of science or policy ; that those persons were shewn to have been well acquainted with him, and, in some instances, to have written to him repeatedly on the same subjects ; can it be said that the sending of such letters, even though not proved to have been acknowledged or acted upon, would, in the ordinary course of life, produce no effect on a reasonable mind ? the question being, not whether the testator was of sound understanding at a particular moment, but what the general state of his mind was throughout his life. If letters had been written to him in a foreign language, with an apparent view to correspondence, by a person who knew him, would no inference arise as to his knowledge of the language ? The present evidence is precisely the same in character, though perhaps not calculated to produce so strong an effect.

Secondly, the letter of *Oliver Marton*, requesting that *Marsden* will direct his attorney to propose terms of agreement with the parish, is an act done, and part of the *res gestæ* in the case. If an eminent lawyer had written to him to become a trustee, the evidence would have been more striking, but not different in character. And, considering such a letter as an act, the circumstance of its being indorsed or unindorsed, or of its having been acted upon or not by the receiver, cannot affect its admissibility. Suppose, in the case of a will, it were proved that a physician of great respectability, since dead, was attending the testator, and, being told that he was about to execute his will, retired in order that he might be at liberty to do so, might not that acquiescence be legitimately proved, to contradict a suggestion that the testator had executed his will when in a state of incapacity ? So the conduct of husband and wife, or of

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relations, to each other is admitted in particular cases, as a fact; the circumstance that particular persons did or did not visit a family is evidence as to the correct or incorrect lives of those at the head of it. Where the value of goods at a particular time is in question, an auctioneer is asked what was the amount of the last real bidding. [*Tindal* C. J. That is direct evidence. There could not be any more direct proof as to price.] The letter in question is also the most direct proof as to the sanity of the person addressed. The proposal to buy is proved as an act; so also is the solicitation to treat with the parish. And so, too, were the attestations of witnesses to Mr. *Marsden's* deeds, which were received without objection at the trial, not as proof of the execution, but as instances of conduct.

Thirdly, it is admitted, in the judgment of the Court of King's Bench (*a*), that "without dispute, any, the least, act done by the testator with reference to the letters would have made them evidence." But the present record shews acts done by the testator to these letters, which, according to the doctrine just cited, make them admissible. All of them were found in a repository of his, with the seals broken, and with other letters which he had answered. There was evidence for a jury that the testator had opened them and put them away. [*Tindal* C. J. It is for the Judge to say whether papers are found under such circumstances that they ought to be received as evidence: the Judge ought to draw such a conclusion as would be drawn by a sensible jury; but the question does not go to them.] The reasonable conclusion here was that the testator had opened and read the letters. But,

(a) *Antè*, p. 325.

further,

further, the letter from *Marton* was indorsed by Mr. *Marsden's* attorney, "20th *May* 1786, letter from Mr. *Marton* to Mr. *Marsden*." The direct inference is, either that *Barrow* was present when *Marsden* read it, or that *Marsden* sent it to him in the course of business. The paper is marked as letters of business usually are when the receiver has attended to them. The letter from *Charles Tatham*, of 12th *October* 1784, was also a letter acted upon, as appears by that of *Marsden* dated *June* 1st 1787, the terms of which prove that *Charles Tatham's* letter had been followed by a correspondence.

As to the suggestion in the judgment below, that the expressions in these letters may be ironical or insincere, that is not the direct and natural inference. An act must be taken, *primâ facie*, to be done in good faith; surmises to the contrary are not grounds for rejecting evidence, although any suspicious circumstance may be fit matter of observation. The sum of the objection taken to this evidence by the Court of King's Bench is, that it amounts to hearsay. That cannot apply, at any rate, to letters acted upon. And all the letters are expressions of opinion, which opinion is vouched by sending them to the party of whom it is entertained. If the letters had never been sent, or had gone to other persons than the testator, the case would have been different.

Cresswell, *contra*. All the letters were inadmissible, because they presented statements which could not be verified by oath, and subjected to the test of cross-examination; and because, as transactions, they were *res inter alios actæ*. It is urged on the other side that such evidence ought to be received, because it would, in the

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ordinary course of life, have some effect on the mind ; but that is a reason for excluding it, if not legitimately entitled to attention according to general rules. In a particular case the assertion, without oath, of a respectable man might influence a reasonable mind ; but the rule, established for the safe administration of justice in general, is, that evidence unconfirmed by oath, and not subject to cross-examination, shall not be received. The letters here are, in truth, offered as shewing the opinions of persons who cannot be called as witnesses ; that is, as introducing their evidence without oath. It is said that the expressions in them are not to be presumed ironical or insincere ; but, if the evidence were given in the ordinary manner by witnesses, that point might be tried by cross-examination ; here it could not. Evidence of reputation, where admitted, is in some degree an exception to the rule against hearsay testimony ; but the principle on which that is received (as laid down in 1 *Stark. Ev.* 30.(a)), is, that the facts which form the subject-matter of reputation “are in ordinary cases imperceptible by the senses, and therefore incapable of the usual means of proof.” That does not apply to a question of mental capacity. Yet it would result from the arguments on the other side that evidence of reputation would be admissible as to that. The character of the persons writing these letters, and their knowledge of the testator, cannot be real grounds for receiving the evidence, because it is admitted that their letters, if written to other parties than the testator, must have been excluded. In criminal cases, a deposition taken before a magistrate in the absence of the prisoner is not evidence, because there can be no cross-

(a) 2d edition.

examination ;

examination; yet it is an act done, and has the sanction of an oath. It is argued on the other side that the writing of these letters is part of the *res gestæ*; and in 1 *Stark Ev.* 57., it is laid down, that "all the surrounding facts of a transaction, or as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established by competent means, and afford any fair presumption or inference as to the question in dispute." Here the fact which it is attempted to prove, however disguised in argument, is not a thing done, but that *Charles Tatham*, *Marton*, and *Ellershaw* thought *Marsden* capable of understanding their letters: and that is not a conclusion legally drawn and established by competent means.

The letter of *Charles Tatham* is, as to the lessor of the plaintiff, *res inter alios*. If it had in direct terms expressed a belief of *Marsden's* capacity, it would have been inadmissible as against the lessor of the plaintiff; and the precise nature of the contents can make no difference. If *A.* and *B.* were severally underwriters on a policy, and, a claim being made, *A.* wrote to the assured, "I believe your demand to be just, and will pay it," that would be no evidence against *B.*; yet it is an act done, and the strongest declaration of *A.'s* belief on the very subject in question between *B.* and the assured. In the case of a life policy, a letter to the assured by a third person, inviting him to hunt or shoot, would not be evidence of his bodily state at the time, as against an insurance company. Or, in a dispute whether or not a ship had been sea-worthy, it would be no evidence, in favour of the sea-worthiness, that a third party had written to the owner desiring to ship goods or to take a passage by her; yet these would be acts

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done, having reference to the subject matter of dispute, and affording the strongest proof of opinion. If any letter now in question was admissible merely as proof of an act done, it would have been so as soon as the letter was put into the post; but this is not contended on the other side. It would have been an act done, if a person had desired his own attorney by letter, or even verbally, to request *Marsden* to make an arrangement with the parish. So, on the other hand, it would have been an act, if any of *Marsden's* relations had written a letter requesting one of his friends to take steps for obtaining a commission of lunacy against *Marsden*. But would that have been evidence for the plaintiff? Again, if a letter is evidence as being an act done by the writer, why may not the letter of a living man be evidence, if the handwriting be proved? The reason is, that such letter raises an inference as to the writer's opinion, and that such opinion is of no value unless the party himself be made a witness: and that reason applies here.

It is said that the letters are evidence, as shewing that *Marsden* was treated as a sane man. But the treatment can be admissible only as introducing evidence of some act done by him: as where a charge of guilt, or demand of a debt, is proved to have been acquiesced in; or a letter answered or acted upon. But, taken by itself, treatment is no more than an act of the party from whom it proceeds. It is not contended that the letters here would have been evidence if they had not reached *Marsden*. They are said to shew competency in him, because such letters could not be written to any but a man of competent understanding. But, by the same reasoning, an affidavit of debt or a warrant for felony might be some evidence of the party against whom it was made being
a debtor

a debtor or a felon. The defendant's counsel assumes that the question as to the effect which these letters should have is one merely of degree ; but it is strictly a question of principle. If the evidence be once admitted, there is no question of degree into which a jury can be expected to enter. If a letter from a scientific man tends to prove that the party receiving it was conversant with a science, it may be considered as proof that he understood the most abstruse points in it. According to the defendant's argument, the fact that a party had been chosen member for a borough, or had been suffered to remain on the panel as a special jurymen, might operate as proof of his perfect competency to those offices : but it is clear that, to warrant any conclusion whatever on this point, there should be some evidence of the circumstances under which he was permitted to act : and that evidence should be given by the persons themselves who took part in conferring the office. So, in the present case, the mere fact that a particular application was made to the testator is no proof, of itself, that he was a proper person to be so called upon : if any such evidence was to be given, it should have been by the persons who made the application. The conduct of relations is admitted to shew the character maintained by members of a family ; but that is on the grounds, stated in 1 *Stark. Ev.* 30. (before cited (a)), upon which evidence of reputation is admitted on other subjects.

As to the particular letters here, that of *Charles Tatham* explains no act done by the testator. The acts of opening and putting it by would have been the same, whatever had been the contents : and the letter afterwards written by *Marsden* (supposing that he ac-

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(a) See the passage partly extracted, p. 342., antè.

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tually wrote such a letter, which is proved only by the draft) is nearly three years later than *Charles Tatham's*, and makes no reference to it. The only proof as to *Oliver Marton's* letter is, that it was found in *Marsden's* cupboard between forty and fifty years after the date, with an indorsement by *Marsden's* attorney: there was no proof of the manner in which it came to the hands of either, nor of the time or occasion of making the indorsement; and it may be questioned whether the indorsement is evidence; if it be, might it not be contended that a minute of a conversation indorsed in the same manner would have been admissible? Neither the letter nor the indorsement explains or qualifies any act of the testator. The last observation applies to all the three letters addressed to *Marsden*.

Then as to the authorities. The judgment of the Court of King's Bench was given after consideration; and one of the two learned Judges who took no part in it had made a similar decision at nisi prius. The rules of evidence in the ecclesiastical Courts differ from those observed at common law. In those courts the Judge, who decides on the fact, may exercise a discretion, in admitting or rejecting evidence, which would be dangerous where the fact is tried by a jury. There are several instances in which the established practice of those Courts upon such points is contrary to ours; as in requiring two witnesses to prove a will of personalty; rejecting the child of a residuary legatee as witness to the will, *Twaites v. Smith* (a); and allowing proof of handwriting by comparison, 1 *Williams on Executors*, 218 (b).

(a) 1 P. Wms. 10.

(b) Part 1. book 4. c. iii s. v. 2d ed. See the judgment of Coleridge J. in *Doe dem. Mudd v. Suckermore*, 5 A. & E. 707—710.

Butlin

Bullin v. Barry (a) is no authority, because there the paper relied upon had been written for and adopted by the person whose capacity was in question: he had made it his own act. In the report of *Wheeler v. Alderson* (b) the letter from the testatrix's father (the only one which can illustrate the present case) is mentioned nowhere but in the judgment of Sir John Nicholl: whence it was produced, and under what circumstances, and whether or not the production of it was objected to, does not appear. But the letter was from the father of the testatrix, whose capacity was disputed, to another person, a stranger to the cause; it would, therefore, have been clearly inadmissible in a court of common law, unless it was connected by evidence (as it may have been) with some act of the testatrix. In *Waters v. Howlett* (c), the fact alluded to on the other side does not appear in the report, though it has been stated (on the former argument in error (d)) that the evidence was not admitted without discussion. There may have been facts bearing upon its admissibility, with which this Court is unacquainted; and the allegation of incapacity was ultimately abandoned, and the codicil established as unopposed. The analogy drawn from the proof of letters in cases of criminal conversation is disposed of by the judgment below.

The defendant in error likewise insists upon the exception taken by him to the proof of execution of the will. [Tindal C. J. If this is the same point which we decided on the former writ of error, we think it should

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(a) Cited in *Wright v. Doe dem. Tatham*, 1 A. & E. 8.

(b) 3 Hagg. Ecc. Rep. 609.

(c) 3 Hagg. Ecc. Rep. 790.

(d) *Wright v. Doe Dem. Tatham*, 1 A. & E. 8.

not

1897. not be gone into now. You may have the benefit of it in a further stage of the cause (a).]

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Sir *F. Pollock* in reply. The objection, that the letters are evidence tendered without oath, does not arise if the letters be considered as acts. The act, for instance, of *Marton* in making a proposal to the testator is proved by evidence on oath shewing that a letter written by him, containing that proposal, came to *Marsden's* hands. The writer, who is dead, cannot be cross-examined, nor in general can the person who is proved to have bid at an auction; but there may be a cross-examination of the witness who proves the bidding, or the transmission of the letter. The evidence now in question is not hearsay; no opinion is offered in proof which has not been embodied in conduct towards the testator; that conduct being complete by its actually taking effect upon him. It is not necessary to contend that a letter which had not reached him would be evidence; but, when it has reached and been opened by him, it becomes part of his personal history. It is said that evidence of reputation is admitted only where the subject matter is

(a) In the statement of the "Case of the defendant in Error," afterwards submitted to the House of Lords, the mode in which he proposed to avail himself of this exception was pointed out as follows:

"He further submits, — Sixthly, — That it is competent to the defendant in error to rely upon the exception made by his counsel at the trial to the opinion of the learned Judge who tried the cause, for that he thereby upholds the verdict and judgment given in his favour by contending that no legal and sufficient proof was given, at the trial, of the execution of any will or codicil by *John Marsden*, and that he rightly recovered by virtue of his title as heir at law, which was admitted at the trial by the counsel for the plaintiff in error. That, if no legal proof was given of the execution of a will by *John Marsden*, the enquiry whether *John Marsden* had capacity to make a will became immaterial, and that it was an enquiry wholly dependant upon previous proof of the will."

imperceptible

imperceptible by the senses, and therefore not capable of other proof. But opinion, vouched by conduct, is evidence in other cases; as, for instance, on the questions already adverted to, respecting the condition of persons in a family. It is true that the argument for the plaintiff in error goes the length of making this kind of evidence receivable though the parties who expressed the opinion should be living. The real question is, what means they had of knowing the person to whom the opinion relates. When they have had such knowledge, and the opinion is embodied in conduct, the argument is, that no rational person would have adopted such conduct if the fact had not warranted it. If the letter of a living person were produced, and he himself not called, the evidence would be of little value, but still admissible. Some of the cases put in illustration on the other side are not strictly analogous; but that of a person applying for a passage in a ship, the sea-worthiness of which is disputed, would be like the present case, and the evidence admissible, supposing the party acquainted with the ship. An arrest for debt would be evidence, if the question turned on the general credit of the party; so perhaps would an arrest for felony, if the enquiry were as to his general reception in the world. The indorsement made on one of the letters by *Barrow*, *Marsden's* attorney, was clearly evidence after *Barrow's* death. The Court will not presume it fraudulently made. It is asked whether a minute of a conversation written in the same manner would have been evidence? The answer is, that, if *Barrow* had so indorsed a communication made to him in the way of business (as "received instructions," &c.), that indorsement would have been evidence, *Barrow* being dead, and the letter remaining

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maining in *Marsden's* custody. With respect to the practice of the ecclesiastical Courts, this Court has the means of enquiring into it, before coming to a decision. The case at nisi prius referred to on the other side, and in the judgment of the court below, was decided after the trial of the present cause at *York* in 1893, when the letters in question were rejected; and the learned Judge, whose ruling is cited, probably knew that the point was about to be raised again, and finally settled, in the present cause.

Cur. adv. vult.

In the ensuing *Easter* term, *Gaselee J.* having retired from the Bench, and *Coltman J.* being now one of the Judges of the Court of Common Pleas, the Court of Exchequer Chamber desired that this case should be argued again; and it was accordingly re-argued in *Easter* vacation, *May* 9th, 1897, before *Tindal C. J.*, *Park*, *Bosanquet*, and *Coltman Js.*, and *Parke* and *Gurney Bs.*

Sir F. Pollock, for the plaintiff in error, after again stating that no direct authority at common law had been found, pursued the same course of argument as on the former hearing. In commenting on the letter of *Charles Tatham*, he urged that, from that and the subsequent letter written to *Charles Tatham* by *Marsden*, an intermediate correspondence must be inferred, on the principle of presumption laid down in *Doe dem. Patteshall v. Turford (a)*, and adopted in subsequent decisions. He stated the result of all these cases to be, that, where

(a) 3 B. & Ad. 890.

certain

certain facts are usually found to follow each other in a series, and some facts of that description are proved in a particular case, it is properly left to a jury to say whether the other facts have not existed; and he contended that the letter of *Charles Tatham* in 1784, that of *Marsden* in 1787, and the other letters there referred to, were links in a chain of circumstances, which might legitimately be completed by supposing a correspondence to have ensued upon the first letter of *Charles Tatham*.

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Starkie, contra. The questions are, First, whether the letters to *Marsden* are evidence independently of any act done upon them: Secondly, whether such acts were done with respect to them as make them evidence if they would not otherwise be so.

As to the first point; the evidence collected from these letters is matter of judgment and opinion. Evidence of that kind is to be more cautiously scrutinised than where the subject matter is obvious to the senses. The witness from whom it comes ought to be cross-examined as to the means he had of forming a judgment, and the diligence and good faith with which they were applied. Here that test is wanting. It is said that the writers knew *Marsden*; but the admissibility of this kind of evidence must be decided by general tests, not by particular and casual ones arising in the individual case. On questions of pedigree, a stranger to the family may often have better means of knowledge than a relative; but the general rule is always adhered to, that declarations on this subject are to be received only when coming from members of the family. It may well be suggested in this case that the persons who wrote to *Marsden*, and knew him, might be unwilling,
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from various motives, to treat him, in their letters, as an imbecile person. Suggestions of that kind are to be excluded only by submitting to those tests of knowledge and of sincerity which the law requires. If those are to be departed from, it might be said here that letters written to another person would be more likely to express a true opinion than letters to *Marsden* himself: it is admitted, here, that such letters would not be evidence, yet, according to the defendant's argument, there would be no ground in principle for excluding them. The admission of evidence not on oath will be found, in all cases, to depend upon its being subject to tests which guarantee knowledge and sincerity. Evidence of this kind is either original or secondary and substituted on failure of original proof. Of the first class are reputation (which is out of the question here) and declarations accompanying acts. The doctrine as to such declarations is laid down in 1 *Phillipps in Evidence*, 291 (a), where many illustrations are given. They are admitted, not as being substantially evidence, but as adjuncts, and as illustrating the quality of the act. Sending a letter is an act, and a letter has been held admissible to shew the writer's object in transmitting a document enclosed; *Bruce v. Hurly* (b). So also a declaration is an act. But neither that nor the letter is admissible merely on that account. The act which it accompanies must be a material one, explained or qualified by it. These letters, therefore, not explaining or qualifying any such act, are not admissible evidence of the first class. Of the second class, are entries or

(a) He cited the 7th edition. See 1 *Phill. on Ev.* 206. part I. c. 12. s. 1., 8th ed.

(b) 1 *Stark. N. P. C.* 23.

declarations

declarations made in the course of some duty or business, and against the interest of the party making them. The latter circumstance is most commonly relied upon, but is not universally requisite; the former appears to be so. (On this point he cited 1 *Phill. on Ev.* 255 (a), where *Short v. Lee* (b) is referred to); *Doe lessee of Reece v. Robson* (c), *Doe dem. Patteshall v. Turford* (d), *Price v. The Earl of Torrington* (e), *Clerk v. Bedford* (g), and *Chambers v. Bernasconi* (h).) The letters in the present case neither operated against the interest of the writers, nor were connected with any discharge of duty.

If, again, these letters be considered as substantive acts, they are *res inter alios*, and can no more bind parties to the cause than the admission of a stranger, or, in a criminal case, the confession of another accused person. Suppose *A.* and *B.* laid a wager, and *C.* and *D.* laid one also, upon the same event: would it be evidence, in an action between *C.* and *D.* upon such wager, that *B.* had written to *A.*, admitting himself to have lost the bet?

(With respect to the cases in the ecclesiastical courts, he observed upon the difference in practice between these and the common law courts as to the reception of evidence, and the comparative safety with which some relaxations may be made in the law of evidence, where the Judge, and not a jury, decides on fact: and he cited *Newton v. Preston* (i), where, on a proposal that

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(a) 7th ed. See vol. i. part I. ch. 16. sects. 1, 2, of the 8th ed. Also 1 *Stark. on Ev.* 298. 2d ed.

(b) 2 *Jac. & W.* 464.

(c) 15 *East* 32.

(d) 3 *B. & Ad.* 890.

(e) 1 *Salk.* 285.

(g) *Bull. N. P.* 282.

(h) 1 *Cro. & J.* 451. *S. C.* 1 *Tyr.* 335. See *Poole v. Dicus*, 1 *New Ca.* 649.

(i) *Proc. in Chanc.* 103.

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certain evidence should be read in a proceeding in equity, *Powell J.* said, "I will not hinder you from reading, for though at law it is not to be allowed, where a jury may be inveigled by that, which is not proper evidence; yet here is no such danger." He then commented shortly on *Wheeler v. Alderson* (a), and *Waters v. Howlett* (b).)

It is not correct to say that the whole history of *Marsden's* life was in issue on the trial. His acts, and the acts of other persons bearing upon his, were evidence so far as they affected the question of competency; but acts of which he was unconscious could not be evidence. If they are said to shew reputation, the answer is that reputation may be admitted to prove the positive status of a party, as his connection with a family, but not capacity, which must be judged of by proof adduced of his own acts and conduct. [*Parke B.* Suppose it were proved that the testator's family had for twenty years kept a mad doctor in attendance.] That would only shew their opinion of the testator's insanity, unless it were proved that the doctor had done some act to coerce him. If a person had been kept to watch him without his knowledge, that would be evidence of opinion only, and inadmissible, though the opinion was vouched by an act. Where the act itself is of no weight, the declaration or expression of opinion which accompanies it must also be disregarded. A distinction is attempted between acts directed to the party himself and acts which, though having reference to him, are directed to third persons; but there is no real difference: on applying the general tests of knowledge and sincerity, both will be alike excluded. As to the supposed case of a physician acquiescing in the execution of a will, if he

(a) 3 Hagg. Ecc. Rep. 609.

(b) 3 Hagg. Ecc. Rep. 790. See *Wright v. Doe dem. Tatham*, 1 A. & E. 8.

had said that he thought the testator competent, or incompetent, that declaration would not have been evidence; neither would the behaviour which is considered as equivalent. Letters to the testator on scientific subjects could have proved only that the writers thought him able to understand them. A letter found in his repository, treating him as a very weak man, would not have been evidence that he was so. The passage in 1 *Stark. Ev.*, 57., where it is said that "all the surrounding facts of a transaction, or, as they are usually termed, the *res gestæ*, may be submitted to a jury," and that "no competent means of ascertaining the truth" can be neglected, by which "an individual would be governed, and on which he would act, with a view to his own concerns in ordinary life," must be taken as referring to those facts and means which the law allows; otherwise no rule of evidence can exist. There must be an exclusion of mere hearsay and *res inter alios*. An individual, in an affair of ordinary life, may often come to a reasonable conclusion on grounds not recognised by law. [*Bosanquet J.* How do you translate "*res gestæ*?"—"Gestæ" by whom?] The plaintiff in error must say by all the world, [*Parke B.* The acts, by whomsoever done, are *res gestæ*, if relevant to the matter in issue. But the question remains, what are relevant?]

The evidence did not shew any acts of *Marsden* connected with the letters put in. It does not appear by the record that the keeping them was an act of his. Three years intervene between the letters from and to *Charles Tatham*; and there is no connection between them in subject. *Marton's* letter is on business; but it does not appear that the business was done. There is no evidence of the time when, or the circumstances

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under which, *Barrow* indorsed it. The plaintiff in error assumes that, before this letter was indorsed, *Marsden* read, and understood it, and acted upon it by sending it to *Barrow*. The argument turns in a circle. It is taken for granted that *Marsden* did that with the letter which a sensible man would do; and the letter is made available, by means of that assumption, to prove that *Marsden* was a sensible man. Those who relied upon the indorsement should have shewn the time and circumstances of the making: in this respect the case is analogous to *Lawson v. Shearwood* (a). It might have been shewn from *Barrow's* books, or in various other ways, whether or not any business was done for *Marsden* in consequence of the letter.

At all events, it was for the Judge at Nisi Prius to decide whether the facts proved with respect to the letter entitled the defendant to read it. Where a question of fact arises at Nisi Prius, on the solution of which it depends, whether certain evidence is admissible or not, the Judge becomes a judge of fact as to that interlocutory matter. [*Parke* B. It is correct that, on such a collateral matter of fact, the Judge should decide; but his judgment is liable to review.] It would be very difficult for a Court of Error to review it; for, on such a point, his decision, like that of a jury, must be influenced by circumstances arising on a vivá voce examination, which the Court of Error could not judge of. A bill of exceptions would be no more applicable to such a finding than to a verdict. [*Tindal* C. J. This argument would have put an end to the question, whether or not the documents came from the proper repository, in *The Bishop of Meath v. The Marquis of Winchester* (b). The very question submitted to us here

(a) 1 Stark. N. P. C. 314.

(b) *Alcock v. Napier*, 508.

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is, whether or not, on a particular state of facts, evidence was rightly rejected. That question is one of the proper subjects of a bill of exceptions.] Then, in a case like this, a court of error becomes a court to determine on fact. [*Bosanquet J.* No conflict of evidence appears in this case.] There is a state of facts from which contrary inferences may be drawn. The Judge is to decide between those. Suppose he had taken the opinion of the jury. [*Parke B.* That would have been improper. If the learned Judge here had said, "I rejected the evidence because I believed one set of witnesses and not another," we could not have interfered.] Here the Judge, upon the facts submitted to him, believed one proposition and not another. There is a case (a) in which *Eyre C. B.* left it to the jury to say whether or not a party who had made certain declarations did so under the apprehension of death; but there have certainly been cases since which support a contrary practice (b). [*Parke B.* The twelve Judges decided, on a question put to them in a case from *Ireland* (c), that such a point, as to a declaration in articulo mortis, ought not to go to the jury.] As to biddings at an auction, the bidding is the very fact which fixes the value, that is, the amount which the article will bring. Proof that a married woman was not visited may be the most direct evidence to shew that the loss of her society was a comparatively small injury.

(a) *Woodcock's Case*, 1 *Leach's C. C.* 500. (4th ed.)

(b) See 1 *Phill. Ev.* 304. note (4) part I. c. 15. 8th ed.

(c) See *Rez v. Hucks*, 1 *Stark. N. P. C.* 523. In *Macnally's "Rules of Evidence on Pleas of the Crown,"* London and Dublin, 1802, pp. 385, 6, two cases are mentioned, where judges in *Ireland* considered it a question for the jury whether the party, whose declarations were offered in evidence, believed himself dying: *Trant's Case*, 1793; *Minton's Case*, 1800.

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The decision in *Doe dem. Patteshall v. Turford* (a) does not affect this case. [Coltman J. Where boundary is proved by reputation, what is the guarantee for sincerity?] The publicity of the transaction, and the general interest in the fact being rightly ascertained. The letters here are said to be instances of treatment; and treatment is, no doubt, evidence, but not when limited to the acts done on one side.

Sir F. Pollock, in reply. The test of sincerity in this case is, that respectable parties openly do that which would disgrace them if they acted against their belief. It is said that the defendant reasons in a circle as to *Marsden's* dealing with the letters; but he merely takes the facts proved, and puts it as a question for a jury whether, assuming that *Marsden* acted like a sane man, the whole case does not square better with probability than on the contrary assumption. In *Wheeler v. Alderson* (b) the letter from the testatrix's father was admissible because her whole history was in question; and, it appearing that an offer of marriage had been made to her, the letter from her father to the party offering shewed how that transaction had ended. It is true that, where the admissibility of evidence depends on a question of fact, that question must be decided by the Judge during the trial; but it is not to be finally determined by his opinion. If the evidence is received, he must, in putting it to the jury, direct them to pay attention to it, or not, as they believe or disbelieve the fact given in evidence to introduce it.

Cur. adv. vult.

(a) 3 B. & Ad. 890.

(b) 3 Hagg. Ecc. Rep. 609.

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On this day the learned Judges, being divided in opinion, delivered judgment seriatim.

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COLTMAN J. Upon the trial of this cause exceptions were taken to the ruling of the Judge, both on the part of the lessor of the plaintiff and on the part of the defendant. It is unnecessary to say any thing on the subject of the exceptions taken on behalf of the lessor of the plaintiff. The objections taken on behalf of the defendant relate to the admissibility in evidence of three letters addressed to the testator by persons now deceased, well acquainted with him during their lives.

Before examining the particular circumstances of the case, in reference to the letters severally, it seems to me desirable to consider the more general question, whether, on an issue as to competency like the present, letters written by third persons to the party whose competency is in dispute are admissible in evidence, though never received by the person to whom they are addressed.

It may be urged, in support of their admissibility, that competency or incompetency is a matter of opinion, and that such letters are evidence of the opinion entertained by the writers, or, at any rate, that the writing of them is an act done; and that, where an act done is accompanied by a declaration of opinion, or, as it was expressed in the course of the argument, where a declaration of opinion is embodied in an act done, it is admissible in evidence. Now, admitting that this is a question of opinion and judgment, we may ask, how is matter of opinion required by the law of *England* to be proved? The general rule is, that it is to be proved by the examination of witnesses upon oath. The ad-

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ministering of an oath furnishes some guarantee for the sincerity of the opinion; and the power of cross-examination gives an opportunity of testing the foundation and the value of it. Such being the general rule, it is necessary for the party who brings forward evidence not on oath to shew some recognised exception to the general rule, within which it falls.

“The true line (says *Buller J.*, in *Rex v. Eriswell* (a)) for Courts to adhere to is, that, wherever evidence not on oath has been repeatedly received, and sanctioned by judicial determinations, it shall be allowed: but beyond that, the rule, that no evidence shall be admitted but what is on oath, shall be observed.” It was admitted, in the argument, that our law books furnish no instance of such evidence having been received; an admission of itself, according to Mr. Justice *Buller*, sufficient to cause it to be rejected. It may be urged that evidence of opinion is admitted in some cases without oath, as, for instance, where reputation is given in evidence to prove a public right. Now, without stopping to consider whether this is strictly a question of opinion, it is a sufficient answer to say that these cases belong to a recognised class, forming an admitted exception to the general rule, and are limited and guarded by various restrictions. The evidence under consideration does not fall within the principle on which the exception is founded, and it is excluded by the restrictions which limit the exception. The principle on which I conceive the exception to rest is this,—that the reputation can hardly exist without the concurrence of many parties interested to investigate the subject; and such concurrence is presumptive evidence

(a) 3 T. R. 707. See p. 719.

of the existence of an ancient right, of which, in most cases, direct proof can no longer be given, and ought not to be expected; a restriction now generally admitted as limiting the exception is this, that the right claimed must be of a public nature, affecting a considerable number of persons. In the question under consideration, the point in issue is capable of direct proof in the widest sense; and it is strictly a question of a private nature.

If such letters are admissible simply on the score of their being evidence of the opinion of the writers, I can see no reason why their verbal declarations should not be so, or their letters to a third party. It is no answer to say that they are excluded as being *res inter alios actæ*; for the same objection would apply in all cases where reputation and the declarations of deceased persons are given in evidence.

But it is contended that the writing of a letter is an act done, and that the contents of the letter are a declaration accompanying an act, and that an opinion (though not evidence *per se*) is yet evidence when embodied in an act. Now it appears to me that, if the letter is admissible on this ground, it must be either because the act is evidence by itself, or because the opinion is evidence. Where an act done is evidence *per se*, a declaration accompanying that act may well be evidence if it reflects light upon or qualifies the act. But I am not aware of any case, where the act done is, in its own nature, irrelevant to the issue, and where the declaration *per se* is inadmissible, in which it has been held that the union of the two has rendered them admissible. Now, to see whether the act of writing one of the letters in question is admissible, nakedly, and *per se*,

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se, we must strip the case of all other circumstances, and suppose the simple fact proved, that *I. S.*, being a stranger to *Mr. Marsden*, wrote a letter to him, and put it into the post office; that the letter was there destroyed, and that its contents are unknown; *I. S.* being a stranger to *Mr. Marsden*, and, for any thing that appeared, quite ignorant of the state of his mental capacity, I would ask whether the writing of the letter under these circumstances would be evidence? Surely not; it would be a fact simply irrelevant, and inadmissible on that ground. It seems to follow that the sending of a letter is not evidence, except on the ground that it contains a declaration of opinion; for, if you strike out (as in the case just supposed) every thing which contains any indication of opinion, the fact is merely irrelevant. You have, then, a fact which is irrelevant, and an opinion which is inadmissible: how can the union of the two furnish competent evidence for the determination of a point in issue, which neither of them, separately, has any legal tendency to prove?

If the view I have taken of this case be so far correct, the result is that, in the case I have been considering, letters are not evidence unless received by the party to whom they are written; nor could the bare receipt of them make any difference, unless they were in some way acted upon. But it cannot be doubted that any act done by the testator with reference to them would be evidence; for it is difficult to say that any act of his is irrelevant to the issue; and such act may make the letter with which it is connected admissible, as explaining the nature of the act done, and indicating the extent of his capacity. The question, therefore, comes to this;—is there evidence sufficient to shew that

that the testator had done any act with respect to these letters? If there is, they ought, as it seems to me, to have been admitted in evidence; if not, they were properly rejected. I will consider first the letter which stands first in order in the bill of exceptions. This letter is addressed to Mr. *Marsden* by his kinsman, *Charles Tatham*, and is dated *October* the 12th, 1784. It should be considered with reference to the letter of Mr. *Marsden* to the same *Charles Tatham*, dated *June* 1st, 1787. The letter last mentioned contains no reference to that of *October* the 12th, 1784; but, as it does advert to a letter received by the writer from *Charles Tatham*, and to another letter written by Mr. *Marsden* to *Charles Tatham*, it furnishes ground for inferring that a correspondence was carried on between them. It may be said that the mere fact of a correspondence being carried on by Mr. *Marsden* is some evidence of capacity, and that each link in the chain is relevant to the question at issue, as tending to prove the fact that a correspondence was carried on: but, on consideration, it seems me that the mere fact of a correspondence being carried on, abstracted from all proof of the nature of it, is not evidence.

The term *correspondence* involves in it the idea of some sequence and connection of ideas, and cannot strictly be applied to a set of letters without a tacit reference to their nature and contents. We must, therefore, look at the contents of the letters. Those written by Mr. *Marsden* may be good substantive evidence; but those written to him stand on a different footing. They may be admissible by way of explaining such of Mr. *Marsden's* letters as refer to them, or are written in answer to them; but, when they are wholly isolated and independent, and where nothing is done upon

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upon them, they can only be considered as declarations of opinion; and as such they are, in my judgment, inadmissible.

The question, then, upon this letter of *October* the 12th, 1784, is reduced to this; — whether there is any proof of an act done by Mr. *Marsden* in reference to it? The case shews that it was found after his death in a cupboard under his bookcase, in his private room, amongst other letters, some of which were indorsed in his hand-writing, and to others of which answers had been sent, also in his hand-writing. The act here done is the opening of the letter, and the placing it in a proper place of deposit. The expression, “after his death,” is somewhat vague; but, taking it to mean immediately after his death, we have here an act done by some one, and the question is, by whom it must be inferred to have been done? If Mr. *Marsden* is considered as a person of competent understanding, the natural inference would be that he did it: if he is not so considered, no such inference arises. Now, his competency being the matter in issue, no assumption must be made either way. Now on whom does the burthen of proof lie? Obviously upon the party contending for the admissibility of the evidence; he must shew an act done by Mr. *Marsden*. It is not enough for him to say no inference can be drawn either way; he must prove affirmatively that an inference arises, from the facts found, that Mr. *Marsden* did the act; but the inference does not arise unless Mr. *Marsden* is assumed to be competent. It seems to me, therefore, that the letter now in question was inadmissible.

With respect to the letter of Mr. *Marton*, the case stands more favourably for the defendant than in the case of the letter last considered, in this respect, that
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the acts done in reference to it are stronger, if shewn to be done by Mr. *Marsden*; but there is, in this case also, the same deficiency of proof that the acts done were done by Mr. *Marsden*. It seems to me, therefore, that this letter, and the third letter also, is inadmissible on the ground above explained. The result is, that, in my opinion, the judgment of the Court below should be affirmed.

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GURNEY B. The history of this cause is extraordinary, and certainly not satisfactory. It came on first in the shape of an issue, *devisavit vel non*, at the *Lent* assizes, 1830. On that trial, the letters to which there were no answers, and on which there were no indorsements, were tendered and rejected, and a verdict found establishing the will; the execution of the will being proved by Mr. *Bleasdale*, one of the attesting witnesses. Application was made to the Lord Chancellor for a new trial; which application was dismissed. The heir at law brought an ejectment, which was tried at the *Lent* assizes at *Lancaster*, 1833. Upon that trial two questions arose: — First, the admissibility of letters, which were, upon the authority of the former decision, rejected: The other, whether the will could be read without producing the surviving attesting witness, Mr. *Bleasdale* being dead? The defendant contended that he was entitled to read the will upon the evidence of the verdict on the former trial. He gave in evidence, also, the testimony of Mr. *Bleasdale* upon the former trial; but did not contend for the admissibility of the will in evidence upon that ground. It was ruled that the will could not be read. Upon these two matters a bill of exceptions was tendered. When the bill of ex-

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ceptions came on to be heard in this Court, before seven Judges, they were unanimously of opinion that the will was receivable in evidence, not upon the ground, which had been contended at the trial, of the former verdict, but upon the evidence of Mr. *Bleasdale*, given on the first trial, which, being proved, was the same as if he had been living. But upon the question respecting the letters, the Judges being divided in opinion, four for receiving and three for rejecting them, no judgment was given. At the Summer assizes of 1834, the cause again came on to be tried. Upon the production of these letters, an objection was taken *pro formâ*, without any argument, and the letters were received. Upon a motion for a new trial, the Court of King's Bench were of opinion the letters ought not to have been received in evidence, and a new trial was granted, which came on at the last Summer assizes; and on that trial those letters were offered in evidence, and, conformably with the decision of the Court of King's Bench, were rejected; upon which this bill of exceptions was tendered.

Thus the venire de novo was granted on a point which the Judge had never been called upon to decide, and a new trial was granted on a point which was decided in conformity with the opinion of the majority of this Court; and this bill is tendered upon the decision founded on the authority of the Court of King's Bench.

[His Lordship then stated, from the bill of exceptions, the question upon which the letters to *Marsden* were tendered in evidence, and the circumstances under which they were found.]

It appears, therefore, that Mr. *Marsden* had a private room, and in a cupboard under the bookcase in that room were found letters of various descriptions, some

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to which he had given answers ; and the letters and answers were read in evidence ; some which he had indorsed ; these too were read in evidence : and the three letters in question, upon which there were no indorsements written by him.

Upon the trial which underwent the review of the Court of King's Bench, the letters that were offered in evidence were many in number. Upon the trial which is now under the consideration of this Court, the letters tendered are reduced to three. One of these letters was written in the year 1799 by the Rev. *Henry Ellershaw*, who had been for many years perpetual curate of *Hornby*, Mr. *Marsden's* parish, to which curacy he had been presented by Mr. *Marsden* ; and it was written upon the occasion of his relinquishing that preferment, and written in the presence of his curate. The second by *Charles Tatham*, the brother of the lessor of the plaintiff, on his arrival in *America*. The third by the Rev. *Oliver Marton*, vicar of *Lancaster*. The two latter of these letters were not, when under the consideration of the Court of King's Bench, accompanied by those circumstances which now distinguish them from the rest.

All the transactions of this gentleman's life were subjected to the view and consideration of the jury, to enable them to form their judgment of the competency or incompetency of his mind ; all that he said, and all that he did, and all that he omitted to say and to do. It appears to me that the ransacking this, which I think must be taken to be his depository of papers and letters, affords no insignificant means of judging of his competency. If the letters had been found with the seals unbroken, that might have afforded evidence of a total want
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of curiosity, if not of imbecility of mind; the finding them with the seals broken is, I think, *primâ facie* evidence that they had been opened and read by him to whom they were addressed and in whose repository they were found. It is said that this supposition is founded on the presumption of competency which is the question to be tried. When it is stated that these undorsed and unanswered letters were found in company with some letters which were indorsed by Mr. Marsden, and with others which were answered by him, and the letters in his own hand produced and read, I do not see that it is forming any presumption of his competency to assume that the seals had been broken, and the letters read by him. It appears to me that it is only from a presumption of his incompetency that any other inference is to be drawn.

The question is not, what is the weight of the evidence when received; the question is not, whether any suspicious circumstances may or may not attach to it; all that is matter of observation to the jury.

If any facts could be introduced to raise a suspicion that these letters were foisted into this place by any other person than Mr. Marsden, they would doubtless have their effect where they ought to have it; but nothing of that sort is stated. The letters bear every mark of genuineness; they were written at periods very remote, when no question of the competency of this gentleman had arisen. They were written by persons well acquainted with him; and these persons were dead long before this question arose. I think, therefore, that the contents of this repository are evidence; evidence of more or less value according as they are fairly or unfairly laid before the jury; evidence of no importance,

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or even affording just grounds for suspicion and for adverse presumption, if garbled.

It is said, who knows that these letters were deposited in this cupboard by Mr. *Marsden*? I think that the company in which they were found is *prima facie* evidence that they were deposited by him; they were found in the same place with the letters which he had indorsed and the letters he had answered. It is matter of inquiry for a jury, whether any other person was likely to have deposited them there; whether any other person used or sat in that room; whether the letters produced were all the letters that were found, or whether they were garbled.

On an indictment for high treason, letters with the seals broken found in the possession of the person indicted are evidence against him, although there be no indorsement of his, and no letter of his in answer; because the presumption is that, the seals having been broken, he has read them, and, having read them, he has preserved them; so here I think that the finding them raises the same presumption, and that it is not a sufficient answer that this is a question of competency.

Upon the other two letters the argument for their reception is much stronger. First, the letter of *Charles Tatham*. It appears that in 1784 *Charles Tatham* went to *America*, and on his arrival he wrote this letter to Mr. *Marsden*, which bears the mark of a ship letter and has the post mark. If nothing more appeared, it would stand upon the same footing as the letter of Mr. *Ellershaw*; but, further, there was found among the said papers of Mr. *Marsden* a draft of a letter from Mr. *Marsden* himself to *Charles Tatham*, dated in *June* 1787, which proves that these parties had been from

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the year 1784 till that time in a course of correspondence ; for he says, — “ I received your letter some time ago, wherein you mention that you had sent me a map of the United States of *America*.” “ I deferred writing till such times as I had made enquiry after it, but did not get the map till the 7th instant. You mention in your letter that you had sent me a small quantity of dried fruit ; I received nothing but the map, for which I am obliged to you,” &c. “ I suppose you have received my last letter wherein you will see an account of your nurse’s death.”

It is objected that this draft of a letter does not make the letter of 1784 evidence, because it is not an answer to that specific letter. I cannot see the difference between a letter which acknowledges another of a series of correspondence, and a letter which acknowledges the letter in question. If it had acknowledged both together, that, it is admitted, would have made it evidence. If the draft had been, “ My dear cousin, — I have received your letter of the 12th of *October* 1784,” and nothing more, that would have made it evidence ; but his answering another letter of a series, commenting upon the terms of that letter, acknowledging the receipt of one thing, and noticing the non-receipt of another, which ought to have accompanied it, &c., &c., that does not make it evidence, because it refers to a later letter of the series. The distinction appears to me to be too refined.

Lastly, there is the letter of the Rev. *Oliver Marton*, the vicar of *Lancaster*, the county town, a few miles from which Mr. *Marsden* then lived, written to him on business requiring professional assistance, requesting that Mr. *Marsden* will order his attorney to wait on one
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of two gentlemen who are named, to propose terms of agreement between himself and the parish, recommending that a case be settled by the two attorneys and laid before counsel. This letter, written fifty-one years ago, by a gentleman intimately acquainted with Mr. *Marsden*, is found to have been in the hands of Mr. *Barrow* the attorney of Mr. *Marsden*, who has been dead thirty-five years; and there is an indorsement on the back of the letter in the handwriting of Mr. *Barrow*, "20th May 1786: Letter from Mr. *Marton* to Mr. *Marsden*." It is objected that this letter is not evidence, because it is not proved, first, that the letter was received by Mr. *Marsden*; secondly, that it was by him shewn to Mr. *Barrow*; thirdly, how it came back into the hands of Mr. *Marsden*; and, fourthly, when Mr. *Barrow* made that indorsement. I think that these observations are applicable only to the effect of the evidence when produced, not to its production; they are to be addressed to the jury. To require such proof of events that occurred half a century ago, is to require impossibilities; the only persons who could have given it have been long in their graves. The legitimate inferences to be drawn from this letter are that the letter was received by Mr. *Marsden*; that he did either personally or by letter consult Mr. *Barrow* upon the subject; and that Mr. *Barrow* had the letter under his consideration, and probably returned it to him with the advice that he thought proper to give upon it. That is the natural and ordinary course of things; and I do not think that we are called upon to presume every thing that is forced and unnatural, to exclude evidence from the consideration of the jury.

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BOSANQUET J. The subject now under discussion was brought before this Court on a former occasion, together with another question which forms the second part of the bill of exceptions in the present case. Upon that latter question the Court was unanimous, and a venire de novo was awarded; but I am not aware that any decided opinion was expressed or entertained by a majority or any particular number of Judges who then constituted the Court. For myself I can say that I had come to no distinct conclusion upon the subject; but, as the Judges, upon discussion among themselves, did not appear likely to come to an unanimous judgment respecting the admissibility of the letters, the decision of the Court was pronounced upon the second question only; I must therefore consider the first question in this case as if it had never been raised in this Court before.

On the bill of exceptions it is stated that the matter in controversy between the parties at the trial, was — [His Lordship then stated it]. In support of the affirmative three letters were tendered in evidence, upon which the following questions arose: First, whether letters addressed to the testator by persons well acquainted with him, and since deceased, which letters were found among the testator's papers after his death, but do not appear to be recognised in any way by the testator, are admissible in proof of his capacity? — Secondly, if not admissible without some recognition of them by the testator, whether any one of the letters set forth on the record is shewn to have been recognised by the testator?

First,—the letters cannot be admissible unless they are relevant to the matter in issue, which matter is the capacity

capacity of the testator. The contents of the letters have no direct relation to the testator's state of mind, but may be taken to shew the opinion of the writers that the person addressed was of competent understanding. If the writers of these letters were produced as witnesses and examined upon oath, their opinion would be receivable in evidence, because the grounds of their knowledge and the credibility of their testimony might be ascertained by cross-examination; but I know of no rule by which the opinion, however clearly expressed, of a person, however well informed, is receivable in evidence, unless it be given in the course of legal examination.

No precedent has been referred to in which such evidence has been admitted upon a trial at law. The extensive and dangerous consequences of allowing such evidence are too obvious to require observation. In all cases where the judgment of third persons upon any matter in issue is receivable, personal examination upon oath is required.

Indeed, it has not been contended that mere matter of opinion, though given by a deceased person, ought to be received. But it is said that letters addressed to the testator are not to be considered as containing matter of opinion only, but that they are acts done; undoubtedly they are acts done by the *writers*, but they are not acts done to the testator. It is said that they are evidence of the manner in which the testator has been treated. If by "treatment" of the testator is only meant the manner in which certain persons of his acquaintance acted in respect of him, I am of opinion that their treatment affords no test of the testator's capacity. If the treatment affect the testator himself, as where language of

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insult, contempt, or ridicule, is employed in his presence, his own conduct and deportment consequent upon such treatment afford evidence from which the condition of his mind may be inferred. But I can see no sound distinction between letters written by one relation of a testator to another, and letters addressed to himself, unless the latter be received by the testator; in which case the relevancy of the evidence consists, not in the contents of the letters, but in the testator's conduct in respect of them; unless the testator be made party to the act by his privity to it, the act shews nothing but the opinion of the agent.

The authority of cases in the Ecclesiastical Courts has been relied upon, in which courts letters, under the circumstances now objected to, have been received in evidence, and several cases have been referred to; *Bullin v. Barry*, 16th January 1834, cited arguendo, 1 A. & E. 8. (a); *Wheeler v. Alderson* (b), *Waters v. Howlett* (c), and two others not reported; *Morgan v. Boys*, and *Handley v. Jones*, Dec. 1836 (d). In neither of the two first of these cases was the point decided. In the first, the memorial written for the testator is stated to have been adopted by him, as well as found among his papers. In the second, the Judge certainly refers to a letter written by the father of the testatrix, to a person who had paid his addresses to her, though she was not shewn to have been privy to such letter. But the propriety of admitting such letter was not made a point in the cause. In the third case, we are informed, though it does not appear in the printed report, that a letter written to the testator by his brother from *France*, not referring to

(a) *Wright v. Doe dem. Tatham*, 1 A. & E. 8.

(b) 3 Hagg. Ecc. Rep. 609.

(c) 3 Hagg. Ecc. Rep. 790.

(d) See p. 337., ante.

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any other letter and not replied to, was received by the Judge (Sir *John Nicholl*) after objection made; and Sir *Herbert Jenner* is stated to have decided the same thing in the two last cases, notwithstanding the judgment of the Court of King's Bench in the present case was cited, saying that such evidence had always been received. It is not the province of this Court to consider whether such evidence is properly receivable in the Ecclesiastical Courts. Those courts are constituted upon principles very different from those which regulate the courts of common law. Where the Judges are authorised to deal both with the facts and the law, a much larger discretion with respect to the reception of evidence may not unreasonably be allowed than in courts of common law, where the evidence, if received by the Judge, must necessarily be submitted entire to the jury. By the rules of evidence established in the courts of law, circumstances of great moral weight are often excluded, from which much assistance might in particular cases be afforded in coming to a just conclusion, but which are nevertheless withheld from the consideration of the jury upon general principles, lest they should produce an undue influence upon the minds of persons unaccustomed to consider the limitations and restrictions which legal views upon the subject would impose. This is matter of daily experience, and requires no illustration by examples.

I do not think, therefore, that the practice of the Ecclesiastical Courts ought to govern our decision; and I can find no principle in the law of evidence recognised either by text writers, or by the courts of common law, under which the evidence stated in the first question can be ranged. Where the capacity of a person is not

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the matter in controversy (a), his knowledge of letters, and of other things found in a place accessible to him in his own house or apartments, may sometimes be presumed; such as writings connected with the charge, upon a charge of treason; notes or other documents forged, or partly forged, upon a charge of forgery; instruments of coining or house-breaking, upon charges of coining or burglary. But where capacity itself is the only object of inquiry to which the proof is directed, knowledge cannot be presumed for the purpose of proving capacity. I am therefore of opinion that the letters addressed to the testator by persons well acquainted with him, and since deceased, and which letters were found among the testator's papers after his death, unless recognised by the testator himself, are not admissible in evidence to prove his capacity.

The three letters tendered in proof of the testator's capacity are stated to have been found after the testator's death, open and with the seals broken, in a cupboard under a bookcase in the testator's private apartment, among other letters, some of which had been answered, and others indorsed by him. If I am correct in holding that the relevancy of these letters depends upon the testator's conduct with respect to them, his conduct is a matter of fact to be proved by the party who seeks to use the letters. If the testator is shewn to have dealt with the letters as a sensible man would deal with them, his doing so will afford evidence of his capacity. But, until it appears that he has acted personally in the matter, there is nothing from which any inference as to his state of mind can be drawn.

(a) See 2 *Stark. Ev.* 801., and notes (2d edition).

Capacity or incapacity to make a will is the matter to be ascertained. In other words, the question is whether he has been in a condition to manage his own concerns, or whether his condition has been such that they must necessarily have been managed for him by others? Such being the real question to be tried, no presumption is to be made that any act bearing upon it was either done by the testator or by any other person for him, since the whole value of the act as evidence of the testator's mind depends upon the part which the testator himself has taken in it. The letters may have been opened, arranged, and deposited in the cupboard by the testator himself, or by his steward, attorney, or other agent. The facts are perfectly consistent with either view of the case; and the latter may have been the case without any imputation of fraud. There is nothing in the record to shew that the place where the letters were found was not accessible to others as well as to the testator himself, even in the testator's lifetime; and it does not appear at what period, or by whom, or under what circumstances, they were found in the cupboard after his death. It might be the proper place for the deposit of the testator's letters; but the mere fact of the letters being found there affords no evidence personally applicable to the testator, unless it be established that he placed them there himself.

It has been urged that these letters were found among others answered and indorsed by the testator himself. Those letters were properly received in evidence, because the testator himself was shewn, by legitimate evidence, to have acted upon them. But his having acted upon those letters afforded no evidence that he had placed among them the letters not acted upon. Indeed,

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deed, if the admissibility of the letters indorsed or answered to prove the testator's state of mind had depended upon their having been deposited personally by the testator in the particular place in which they were found, I am not prepared to say that the testator's personal act in placing them there could be inferred from his previous recognition by indorsing and answering them.

It has been further argued that the privity of the testator to all the three letters in question appears upon distinct grounds applicable to each. The letter written by *Charles Tatham* is contended to be receivable as part of the correspondence between himself and the testator. The letter in question is dated *Alexandria, 12th October 1784*. It does not refer to any letter received from the testator, nor does it appear to have been answered by the testator. But a draft of a letter in the testator's hand to *Charles Tatham*, dated 1st of *June 1787*, was produced and received in evidence; which draft acknowledges the receipt of a letter "some time ago" from *Charles Tatham*, in which he mentioned having sent to the testator a map of the United States of *America*, and some dried fruit, but in which he makes no allusion whatever to any of the matters contained in the letter of the 12th of *October 1784*. This draft, therefore, cannot be used as a recognition of the letter of *Charles Tatham*, written three years before, and, consequently, cannot afford any evidence of the impression on the testator's mind evinced by him on the perusal of it.

The second letter was addressed to the testator by *Oliver Marton*, the vicar of *Lancaster*, dated 20th *May 1786*, in which the writer begs the testator to order his attorney to wait on Mr. *Atkinson* or Mr. *Watkinson*, for the

the purpose of getting a case stated for the opinion of counsel, respecting some matters in difference between the testator and the parish, and requesting an answer. No answer appears to have been given, nor was any personal act of recognition by the testator proved. But after his death a letter was found in the cupboard, indorsed in the handwriting of Mr. *Barrow*, who was the testator's attorney, "20th May 1786. Letter from Mr. *Marton* to Mr. *Marsden*." Mr. *Barrow* had been dead above thirty-five years at the time of the trial. It was strongly contended that, as the letter appeared by the indorsement to have come to the hands of Mr. *Barrow*, the testator's attorney, the testator must be presumed to have given it to him, pursuant to the request contained in the letter; and that his having done so afforded evidence of his understanding the letter, and acting upon it. If the delivery of the letter to *Barrow* by the testator be assumed, the consequence deduced from it will be just. But upon what ground can that fact be assumed, in a case where the issue turns upon the testator's mental soundness or unsoundness, upon his capacity or incapacity to act reasonably for himself? It is reasonable that a person who receives a letter addressed to him containing a request to give orders to his attorney, should give orders accordingly. But if the giving such orders be relied upon as proof of the receiver's reason, it ought to be shewn that the orders were given by him. That fact is the only foundation upon which the inference rests, and without proof of which no inference whatever can arise. In truth the course of reasoning is this,—the testator delivered the letter to *Barrow*, because he understood it, and he understood it because he delivered it. In this case it is no way shewn how the letter

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letter came into *Barrow's* hands, nor when he indorsed it, whether he received any orders respecting it, whether any thing was done upon it, nor upon what occasion it came out of *Barrow's* hands again, and found its way to the cupboard in the testator's house. The testator's affairs may have been conducted by his man of business; and, from the nature of the case, it is quite as likely that the letter should have been given or sent to *Barrow* by him as by the testator; at all events, the supposition is not inconsistent with any thing that appears upon the record.

It has been said that, if the presumption of the testator having given or sent the letter would have been receivable in the case of a person whose reason was not the subject of inquiry, to withhold such presumption is to assume incapacity. In my opinion neither capacity nor incapacity is to be assumed; but, where the question is whether the one or the other was the state of mind to be ascribed to the testator, the question cannot be resolved without proof that all rational acts relied upon were the acts of the testator himself. It may be here observed that a question arises upon this letter which affects the presumption that all the three letters in question were placed in the cupboard by the testator, on account of their being found among other letters indorsed or answered by him. Who placed *Marton's* letter in the cupboard? That letter was indorsed by *Barrow*, the testator's attorney. How and when did it come back from his hands? Did he place that letter in the cupboard? If he did, why may he not have arranged the other letters for the testator and placed them in the cupboard also? If the indorsement of the testator's attorney does not prove *his* having put the particular

particular letter which he indorsed in the cupboard, what ground is there for inferring, from the mere indorsement of some letters by the testator, that he placed in the cupboard all the letters, indorsed and unindorsed, which were found there? The grounds, when examined, appear to me far too loose to afford the foundation for any inference at all.

The last of the three letters, dated 3d *October* 1799, was addressed to the testator, and was written by *Henry Ellershaw*, in the presence of *John Garnett*, his assistant, when *Ellershaw* was about to relinquish the chapelry of *Hornby*, to which he had been presented by the testator, and contains strong expressions of the writer's gratitude and affection. No other circumstance having been adduced to shew the testator's personal recognition of this letter beyond that of its being found with the others, it is scarcely necessary to say that, if the two first letters ought to be rejected, this must, a fortiori, be rejected also.

It is obvious that the contents of letters may be dictated by various motives, according to the dispositions and circumstances of the writers. Language of affection, of respect, of rational or amusing information, may be addressed from the best of motives to persons in a state of considerable imbecility, or labouring under the strangest delusions. The habitual treatment of deranged persons as rational is one mode of promoting their recovery. A tone of insult or derision may be employed in a moment of irritation in writing to a person in full possession of his reason; what judgment can be formed of the intention of the writers, without an endless examination into the circumstances which may have influenced them? And what opinion can be collected

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collected of the capacity of the receiver without ascertaining how he acted when he read the language addressed to him? To me it appears that the admission in proof of capacity of letters unaccompanied by other circumstances than such as are stated in this record would establish an entirely new precedent in a court of common law, from which very great inconvenience might result upon trials of sanity, as well of the living as of the dead; consequently, that the evidence was properly rejected by the Judge of assize, and that the judgment of the Court of King's Bench ought to be affirmed.

Parke B.

PARKE B. (After stating the contents of the record.) The question for us to decide is, whether all or any of the three rejected letters were admissible evidence, on the issue raised in this case, for the purpose of shewing that Mr. *Marsden* was, from his majority in 1779 to and at the time of the making of the alleged will and codicil in 1822 and 1825, a person of sane mind and memory, and capable of making a will?

It is contended, on the part of the learned counsel for the plaintiff in error, that all were, on two grounds:—First,—that each of the three letters was evidence of an act done by the writers of them *towards* the testator, as being a competent person; and that such acts done were admissible evidence on this issue *proprio vigore*, without any act of recognition, or any act done thereupon by him.

Secondly,—that in each of the three cases mentioned in the bill of exceptions, or at least in one of them, there was sufficient evidence of an act done by the testator, with reference to those letters respectively, to render their

their contents admissible evidence by way of explaining that act upon the principle laid down by the Court of King's Bench (6 *Neville and Manning*, 146.(a)). I am of opinion, upon a careful consideration of the case, and the arguments on both sides, at this bar, that none of the three letters were admissible, either on one ground or the other. It will be convenient, and facilitate the arrival at a just conclusion, to keep these two questions entirely distinct from each other.

First, then, were all or any of these letters admissible on the issue in the cause as acts done by the writers, assuming, for the sake of argument, that there was no proof of any act done by the testator upon or relating to these letters or any of them,—that is, would such letters or any of them be evidence of the testator's competence at the time of writing them, if sent to the testator's house and not opened or read by him?

Indeed this question is just the same as if the letters had been intercepted before their arrival at his house; for, in so far as the writing and sending the letters by their respective writers were acts done by them towards the testator, those acts would in the two supposed cases be actually complete. It is argued that the letters would be admissible because they are evidence of the *treatment* of the testator as a competent person by individuals acquainted with his habits and personal character, not using the word *treatment* in a sense involving any *conduct* of the testator himself; that they are more than mere statements to a third person indicating an opinion of his competence by those persons; they are acts done *towards* the testator by them, which would not have been done

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(a) *Ante*, p. 325.

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if he had been incompetent, and from which, therefore, a legitimate inference may, it is argued, be derived that he was so.

Each of the three letters, no doubt, indicates that in the opinion of the writer the testator was a rational person. He is spoken of in respectful terms in all. Mr. *Ellershaw* describes him as possessing hospitality and benevolent politeness; and Mr. *Marton* addresses him as competent to do business to the limited extent to which his letter calls upon him to act; and there is no question but that, if any one of those writers had been living, his evidence, founded on personal observation, that the testator possessed the qualities which justified the opinion expressed or implied in his letters, would be admissible on this issue. But the point to be determined is, whether *these letters* are admissible as proof that *he did possess these qualities*?

I am of opinion that, according to the established principles of the law of evidence, the letters are all inadmissible for such a purpose. One great principle in this law is, that all facts which are relevant to the issue may be proved; another is, that all such facts as have not been admitted by the party against whom they are offered, or some one under whom he claims, ought to be proved under the sanction of an oath (or its equivalent introduced by statute, a solemn affirmation), either on the trial of the issue or some other issue involving the same question between the same parties or those to whom they are privy. To this rule certain exceptions have been recognised; some from very early times, on the ground of necessity or convenience; such as the proof of the quality and intention of acts by declarations accompanying them; of pedigrees, and of public

public rights by the statement of deceased persons presumably well acquainted with the subject, as inhabitants of the district in the one case, or relations within certain limits in the other. Such also is the proof of possession by entries of deceased stewards or receivers charging themselves, or of facts of a public nature by public documents; within none of which exceptions is it contended that the present case can be classed.✓

That the three letters were each of them written by the persons whose names they bear, and sent, at some time before they were found, to the testator's house, no doubt are *facts*, and those facts are proved on oath; and the letters are without doubt admissible on an issue in which the fact of sending such letters by those persons, and within that limit of time, is relevant to the matter in dispute; as, for instance, on a feigned issue to try the question whether such letters were sent to the testator's house, or on any issue in which it is the material question whether such letters or any of them had been sent. Verbal declarations of the same parties are also *facts*, and in like manner admissible under the same circumstances; and so would letters or declarations to third persons upon the like supposition.✓

But the question is, whether the contents of these letters are evidence of the *fact to be proved upon this issue*, — that is, the actual existence of the qualities which the testator is, in those letters, by implication, stated to possess: and those letters may be considered in this respect to be on the same footing as if they had contained a direct and positive statement that he was competent. *For this purpose* they are mere hearsay evidence, statements of the writers, not on oath, of the truth of the matter in question, with this addition, that they have

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acted upon the statements on the faith of their being true, by their sending the letters to the testator. That the so acting cannot give a sufficient sanction for the truth of the statement is perfectly plain ; for it is clear that, if the same statements had been made by parol or in writing to a third person, that would have been insufficient; and this is conceded by the learned counsel for the plaintiff in error. Yet in both cases there has been an acting on the belief of the truth, by making the statement, or writing and sending a letter to a third person; and what difference can it possibly make that this is an acting of the same nature by writing and sending the letter to the testator? It is admitted, and most properly, that you have no right to use in evidence the fact of writing and sending a letter to a third person containing a statement of competence, on the ground that it affords an inference that such an act would not have been done unless the statement was true, or believed to be true, although such an inference no doubt would be raised in the conduct of the ordinary affairs of life, if the statement were made by a man of veracity. But it cannot be raised in a judicial inquiry; and, if such an argument were admissible, it would lead to the indiscriminate admission of hearsay evidence of all manner of facts.

Further, it is clear that an acting to a much greater extent and degree upon such statements to a third person would not make the statements admissible. For example, if a wager to a large amount had been made as to the matter in issue by two third persons, the payment of that wager, however large the sum, would not be admissible to prove the truth of the matter in issue. You would not have had any right to present it to the jury as raising an inference of the truth of the fact, on the

the ground that otherwise the bet would not have been paid. It is, after all, nothing but the *mere statement* of that fact, with strong evidence of the belief of it by the party making it. Could it make any difference that the wager was between the third person and one of the parties to the suit? Certainly not. The payment by other underwriters on the same policy to the plaintiff could not be given in evidence to prove that the subject insured had been lost. Yet there is an act done, a payment strongly attesting the truth of the statement, which it implies, that there had been a loss. To illustrate this point still further, let us suppose a third person had betted a wager with Mr. *Marsden* that he could not solve some mathematical problem, the solution of which required a high degree of capacity; would payment of that wager to Mr. *Marsden's* banker be admissible evidence that he possessed that capacity? The answer is certain; it would not. It would be evidence of the fact of competence given by a third party not upon oath.

Let us suppose the parties who wrote these letters to have stated the matter therein contained, that is, their knowledge of his personal qualities and capacity for business, on oath before a magistrate, or in some judicial proceeding to which the plaintiff and defendant were not parties. No one could contend that such statement would be admissible on this issue; and yet there would have been an act done on the faith of the statement being true, and a very solemn one, which would raise in the ordinary conduct of affairs a strong belief in the truth of the statement, if the writers were faith-worthy. The acting in this case is of much less importance, and certainly is not equal to the sanction of an extra-judicial oath.

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Many other instances of a similar nature, by way of illustration, were suggested by the learned counsel for the defendant in error, which, on the most cursory consideration, any one would at once declare to be inadmissible in evidence. Others were supposed on the part of the plaintiff in error, which, at first sight, have the appearance of being mere facts, and therefore admissible, though on further consideration they are open to precisely the same objection. Of the first description are the supposed cases of a letter by a third person to any one demanding a debt, which may be said to be a treatment of him *as a debtor*, being offered as proof that the debt was really due; a note, congratulating him on his high state of bodily vigour, being proposed as evidence of his being in good health; both of which are manifestly at first sight objectionable. To the latter class belong the supposed conduct of the family or relations of a testator, taking the same precautions in his absence as if he were a lunatic; his election, in his absence, to some high and responsible office; the conduct of a physician who permitted a will to be executed by a sick testator; the conduct of a deceased captain on a question of seaworthiness, who, after examining every part of the vessel, embarked in it with his family; all these, when deliberately considered, are, with reference to the matter in issue in each case, mere instances of hearsay evidence, mere statements, not on oath, but implied in or vouched by the actual conduct of persons by whose acts the litigant parties are not to be bound.

The conclusion at which I have arrived is, that proof of a particular fact, which is not of itself a matter in issue, but which is relevant only as implying a statement

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or opinion of a third person on the matter in issue, is inadmissible in all cases where such a statement or opinion not on oath would be of itself inadmissible; and, therefore, in this case the letters which are offered only to prove the competence of the testator, that is the truth of the implied statements therein contained, were properly rejected, as the mere statement or opinion of the writer would certainly have been inadmissible. It is true that evidence of this description has been received in the Ecclesiastical Courts. But their rules of evidence are not the same in all respects as ours. Some greater laxity may be permitted in a court which adjudicates both on the law and on the fact, and may be more safely trusted with the consideration of such evidence than a jury; and I would observe, also, that in no instance has the propriety of the reception of it even in the spiritual courts been confirmed by the Court of Delegates. I do not think, therefore, that we are bound by the authority of the cases referred to in the Ecclesiastical Courts.

The next question is, whether there is any evidence of an act done with reference to these three letters, or any of them, to render their contents admissible by way of explaining that act. I am clearly of opinion that none of them were admissible on this ground.

[His Lordship then stated the facts as to the finding of the letters, and described those set out in the bill of exceptions.]

The first remark to be made on this statement, and which applies to all the three letters, is, that the place in which they were found is not proved to be that where the testator was in the habit, in his lifetime, of keeping the letters addressed to him, which he had opened and read, or any of his papers; nor is it stated that they

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were found *immediately after* the testator's death. The place and time of finding them, therefore, afford no evidence that the letters were placed there by the testator in his lifetime. So far as relates to the place and time of finding, the letters might have been put there after the testator's death; but, passing by that circumstance, let us suppose that they were found immediately on the testator's decease, so as to exclude any inference that they were placed there after his death; I cannot see what evidence there is that they were opened, read, and placed there, by the *testator*, which would be acts done by him, and which would render the contents admissible; because that circumstance would prove capacity to the limited extent of his ability to open, to read the letters, and put them by. In no other way could the contents be admissible.

(Now there is no *direct* evidence, that is, evidence that the testator was seen to open, read, and deposit the letters in that place; and therefore the only question is, whether those facts may be *inferred* from the facts proved, that is, from the facts that the letters were found *instantly after* the testator's death, opened, with the the seals broken, in the place with other papers recognised by him. This would be a very proper inference from those facts, on the presumption that the testator had capacity to *transact business of that nature*; and if there was a cause relative to the testator's property, in which his capacity and competence were not in dispute, and an issue raised thereon, whether he had personal notice of the contents of any of the letters so found, the fact of finding them at the time and place supposed would raise the inference of such notice; but that would be founded on the presumption that, *primâ facie*, every
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one is of competent understanding, until the contrary is proved; and that a competent man, in that situation of life, would be able to read and understand such letters. But in this case the evidence is admissible only for the purpose of proving capacity, and for no other purpose whatever; and it seems to me that the argument in favour of admitting the contents of the letters to be read as evidence proceeds on a fallacy. It is a clear instance of the *petitio principii*, of reasoning in a circle:—it assumes the testator to be competent, in order to raise the inference that he was cognisant of the contents of the letters, and then makes *use* of the presumed cognisance of the contents of the letters to prove that he was competent. The reasoning proceeds thus;—because he had sufficient ability to do business, therefore it is to be inferred that he read and understood the letters; and because he read and understood the letters, therefore he is to be inferred to have been of sufficient ability to do business.

It is indeed said, by the learned counsel for the plaintiff in error, that he makes no assumption either way; he neither assumes capacity nor incapacity, but only draws an inference from the facts of the letters being found open in the way described; but in reality, though he professes to make no such assumption, the inference cannot be drawn at all without making an implied assumption to that effect: for on what other ground can you infer from these facts that the *testator* opened, read, and placed the letters there? If he was utterly senseless and imbecile in mind and body, you could not infer that he did so; and it is only because a man capable of reading and doing business would naturally do such acts, that you could infer that the testator did them. That is, upon a presumption of com-

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petence such inference may be drawn, but not otherwise. Nor can you use the inference of competence derived from *other facts*, which appear on the bill of exceptions to have been proved, to make *these* admissible, the only question being, whether *these facts of themselves* do conduce to prove that competence.

The argument, therefore, that the facts proved raise an inference of competence, seems to me clearly to be an assumption of the whole question. This objection applies equally to the case of Mr. *Marton's* letter, though the fallacy in that case is somewhat more disguised. The fact of the attorney's indorsement being on the letter is clear proof that *he* had such possession of it in his lifetime as to be able to make an indorsement; but that circumstance does not advance the case, in reality, a step further. The inference that Mr. *Marsden* read the letter, and, finding a request to refer it to his attorney, did so, and delivered the letter to him, and therefore, that *he* was to that extent competent (which is the only way in which the evidence is relevant to the issue), is altogether founded on the presumption of that competence, and is just as much an instance of the *petitio principii* as the other to which I have already referred. You assume his capacity to understand the contents of the letter and act upon them like a man of business, and infer from that that he did understand the contents and act upon them; and then you use the facts so inferred as proof of that capacity. Unless you assume the testator's competence, the only point to be proved, the fact given in evidence is not relative to the issue. It is proved that the letter was addressed to the testator, was *opened* by some one, and in the attorney's hands; if this was done by the testator, it is some little evidence
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of capacity, and is relevant to the issue ; but, unless you assume the testator's capacity, the only matter to be proved, you cannot draw any inference that it was done by him.

The first letter, that of Mr. *Tatham*, stands precisely on the same footing, in this respect, with the others, so far as relates to its being found with the testator's papers, open, and with the seal broken, and to the inference sought to be derived therefrom, that it was opened and read by the testator. It is impossible to contend that the copy of Mr. *Marsden's* letter to him makes the contents of his letters admissible by way of explanation, as it is no answer to it, nor contains any reference whatever to its contents, nor to the subject of it. The first letter cannot possibly explain the contents or meaning of the second, nor can the fact of Mr. *Marsden* writing that letter raise any inference that he was cognisant of the contents of the first : so far as the fact of writing that letter proves competence, the evidence was admissible and admitted. I am of opinion, therefore, that the contents of none of the letters were admissible, and that our judgment ought to be for the defendant in error.

PARK J. It is with great reluctance and concern that I give any opinion in the present case, because, differing, as I unfortunately do, from three of my very learned Brothers, who have now delivered their judgments, I cannot but feel great doubt about the validity of my own opinion. Still it is my duty to declare my conscientious judgment ; and I have at least the satisfaction of not being quite alone in the opinion I give, concurring as I do entirely with my learned brother

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Gurney, and partly supported, as I believe I shall be, by the very learned person who is to follow me. I am happy, too, to believe that there is no difference amongst us as to the principle or rule of law which is to govern this case: the difference that arises is upon the application of the facts to that principle.

The question is, whether the three letters mentioned in the bill of exceptions, or any or either of them, ought to have been received in evidence by my learned Brother at the trial? No such letters were much pressed upon me at the first trial, though I believe they were tendered; but, upon the second trial, before my Brother *Gurney*, he rejected these, or similar letters, and a bill of exceptions was tendered to him on that ground. That point came to be argued in this Court with another exception; and, as all the Judges agreed in favour of the plaintiff in error upon the second exception, it was not necessary then to decide the first, the Judges then present not being unanimous, as I lament they are not unanimous now. The point now, as it was argued formerly, was as to the admissibility of certain letters written to the testator by respectable persons now deceased, well acquainted with the testator, which, it was said, ought to be laid before the jury to shew in what manner the testator was *treated* by the letter writers; and such treatment ought to be shewn in order to disprove his alleged imbecility. I adopt the rule laid down in the King's Bench (6 *Neville and Manning*, 146. (a)), that it ought to appear that some act (that Court admitting that the least act done by the testator would be sufficient) that some act done by the testator, with reference to the letters, would have made

(a) *Antè*, p. 325.

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them evidence; for such act could not properly be explained without reference to them; and, if received, no rule of law could have prevented their full effect from being produced on the minds of the jury. To all that I accede; and I insist that some act *was done by him*, as to all the three letters in controversy, but most assuredly *as to one* of them.

In the outset it must be remarked that the date of these letters is very remote, one of them being fifty-three years old, another fifty-one, and another near forty years old. I am not prepared to say, if these letters had been very modern, and the supposed insanity had recently taken place, there might not have been more ground of suspicion; indeed, probably modern letters could not be at all received, especially if the writers were alive. But in this case the party now appealed against denied the testator's competency, alleging his entire natural incapacity *a nativitate*.

This, I own, seems to me opening so wide a space for investigation, that, admitting, on the one hand, treatment of persons who considered him weak and an idiot, so, I think, on the other, ought to be admitted the expressions he used, and his manner of conducting himself, and also the manner in which he was received, treated, and dealt with by respectable and honourable persons at a time long before, years before, nay nearly half a century before, any question arose respecting a will, excluding thereby all possibility of fraud or collusion. Upon this subject the passage referred to from Mr. *Starkie's* invaluable work, and which is well supported by the authority of cases, is not inapplicable to the present discussion. "It seems to follow" (says this learned author (a)) "that all

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(a) 1 *Stark, Ev.* 57. (2d ed.)

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the surrounding facts of a transaction, or as they are usually termed, the *res gestæ*, may be submitted to a jury, provided they can be established *by competent means*, and afford any fair presumption or inference as to the question in dispute; for” “so frequent is the failure of evidence, from accident or design, and so great is the temptation to the concealment of truth and misrepresentation of facts, that no competent means of ascertaining the truth can or ought to be neglected by which an individual would be governed, and on which he would act, with a view to his own concerns in ordinary life.”

Taking this then to be a sensible rule, let us see whether *competent means* have not been rejected, as evidence to shew the opinion of all those honourable persons by whom he was surrounded, and who treated him as a sane, and though not a bright, yet a man *competent to the ordinary concerns of life*. It seems to me impossible to suppose that persons of character and intelligence, who were well acquainted with him, wrote *such* letters to him as they would not have addressed to any but a person whom they supposed to be, of sound mind, and this covering the period in which he is said to be unfit for associating with the general class of men with whom his station in life would otherwise entitle him to associate.

The first material letter which was rejected was one from *Charles Tatham*, the testator's cousin, dated from *America*, as long ago as the year 1784, the contents of which have been much commented upon. [His Lordship here read the letter.] This letter was marked, as the bill of exception states, with the *London* post mark, and a ship letter, and was in the handwriting of *Charles Tatham*.

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Let it be observed, and I think it a most material circumstance, that amongst the papers of the testator was found, as appears by the bill of exceptions, a draft or copy of a letter from the testator to the said *Charles Tatham*, in the handwriting of the testator, which, though not an answer to the former, being written three years after, shews that a correspondence was going on between these two cousins. [His Lordship here read the letter.] If this be not an acting between correspondents, I know not what is.

For the present I pass over Mr. *Marton's* letter, the vicar of *Lancaster*, though anterior in point of date to the one I am about to mention, namely, that of Mr. *Ellershaw*, a clergyman of the church of *England*. This letter is dated in 1799; and I will not believe that any man of that sacred function could write *such* a letter, expressive of such sentiments of the piety and benevolence of the person to whom it was addressed, by one who for years had been his spiritual pastor and guide, and who being about to quit, or having actually quitted, his charge, must have been the vilest hypocrite to write such a letter, without one secular motive to serve in doing so.

[His Lordship here read the letter.]

But what are we to say to the rejection of the letter of the Rev. Mr. *Marton*, dated as long ago as 1786. He lived nine miles, or more, from the testator. He was vicar of *Lancaster*; the last man in the world to write, we should suppose, to an idiot; and he writes a letter and sends it to Mr. *Marsden* upon *business*, and upon business merely, requesting him to attend, or order his attorney to attend, a meeting, "and propose some terms of agreement between you and the parish or township, or disagreeable things must unavoidably happen. I recommend that a case should be settled by
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your and their attorneys, and laid before counsel, to whose opinion both sides should submit, otherwise it will be attended with much trouble and expense to both parties."

Mr. *Marsden's* attorney, who was afterwards a barrister, lived at *Lancaster*, some miles from *Wennington*, where Mr. *Marsden* then lived, and we find Mr. *Barrow's* indorsement upon it; so that he must have gone to Mr. *Marsden* on being sent for, or Mr. *Marsden* to him, to do the needful. But it is doubted by the defendant in error whether Mr. *Marsden* ever read it. The date of the letter is 20th *May*, and that is the same date in the indorsement by Mr. *Barrow*; and, as the letter is directed to Mr. *Marsden*, at *Wennington*, and Mr. *Barrow*, some miles off, at *Lancaster*, and must have been sent that very day to Mr. *Barrow*, why are we to suppose that some person, at that distant period, half a century from this time, opened this letter and sent it to Mr. *Barrow*, unknown to *Marsden*, and foisted it in amongst other papers to furnish evidence half a century afterwards, to establish a will which did not then exist, and did not exist till 1822, nor the codicil till 1825? If these are not acts of recognition as laid down by the Court of King's Bench, I know not what other acts can be so considered.

But it is said that the testator has done no act upon it. I deny that. First of all I have mentioned the length of time since which these letters were written; two of them above fifty years ago, one of them nearly forty years since. Where were they found? With *other papers* in a cupboard under his bookcase in his *private room*; and the letters had all been opened. It is not stated that this cupboard was opened to all the world,

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or that his *private* room (for so the bill of exceptions calls it) was accessible to all intruders : it must be considered as his place of deposit. The seals of all were broken, and one cannot believe but that they were read and laid by : an idiot never would have done so ; he would have thrown them aside. I have heard it stated, and I believe it to be so, that such letters, &c., would have been received in the Ecclesiastical Courts ; but I cannot get at sufficient evidence to enable me to found my opinion on their practice, and therefore I do not. It has been said indeed that, even if it were so, their rules of evidence are different from ours. It may be so ; but, if so, I lament that in the same country, though the rules of practical forms in different courts may be different, the substantial rules of evidence should vary. Here, however, I have declared my own opinion upon the rules of our own law, but with great doubt and hesitation, on account of the opinion of those opposed to me ; and it must be recollected that all fraud is excluded. I also lament with deep concern that this sort of evidence has been pressed ; because, having been the first common law Judge to try this cause about six or seven years ago, when such evidence, I believe, was tendered to me, though not pressed, it does appear to me that the admission or non-admission of such letters as these was a feather in the scale of justice. However, being pressed to it, I am bound to declare my serious and conscientious opinion that such letters, under the circumstances, should have been received. But I must say humbly that the rejection of the letters has been supported upon a variety of conjectures and suppositions wholly unfounded, imputing fraud to persons who hardly existed at the time those letters were written : and therefore

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fore I am of opinion the judgment of the King's Bench ought to be reversed.

TINDAL C. J. The question raised upon this bill of exceptions is, whether three letters therein set forth, or any of them, ought, under the circumstances stated in the bill of exceptions, to have been held by the learned Judge who tried the cause to be admissible as evidence before the jury, on a question of the competency of the party to whom such letters were addressed. And the conclusion at which my mind has arrived is, that one of those letters, viz., that which was written by Mr. *Oliver Marton*, the vicar of *Lancaster*, ought to have been held admissible, and its contents to have been submitted to the consideration of the jury, but that the other two letters were properly rejected.

The question to be determined by the jury was, whether or not the testator *John Marsden* was and had been, from the time he attained his full age in 1779, and down to and at the time of his making his will and codicil, in the years 1822 and 1825 respectively, a person of sane mind and memory, and capable of making a will. And, in order to determine that question, I conceive all that was said, written, or done by the testator himself at any time during such period was the most direct and the best evidence to ascertain the state of his understanding; and that the next in degree, because intimately connected with it, would be all that was said to him, written to him, and done to him during the same period, by his friends and others who had access to him; provided always, that what was so said, written, or done to him by others, is shewn to have come home to his actual knowledge; but I consider this condition to be indispensable

dispensable as to the admissibility of this second class of evidence; for, as to what was said by others but not heard by the party whose understanding is the subject-matter of inquiry, or written by others but which never reached him, or done by others but never known by him to have been done, it appears to me that such speaking, or such writing, or such acting, can amount to no more than an expression of the opinion of the speaker, or the writer, or the actor, and that such opinion, not having been given upon oath, and not being subject to cross-examination as to the grounds upon which it was originally formed or continued, cannot, upon that account, be deemed admissible in evidence. I cannot therefore accede to the position which has been contended for by the learned counsel on the part of the plaintiff in error, that mere treatment of the party by others without or beyond the reach of the knowledge of the party himself, or, as it was sometimes expressed, conduct of others *towards* him, although not amounting to conduct *to* himself, can form a legitimate or admissible species of evidence. Evidence of that description may have been held admissible in questions relating to the *status* of mind or competency of a testator before ecclesiastical tribunals; those courts may, perhaps, and not improperly, have allowed evidence of the manner in which a person has been treated by his friends and others, without inquiring whether those modes of treatment came home to the understanding of the testator. But in an ecclesiastical court the same persons are judges both of the law and the fact; and their experience and sagacity may be sufficient to prevent any injurious consequences from a class of evidence which approaches so closely to, if it is not in fact, mere opinion of the wit-

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ness, by giving such testimony no more weight than it really deserves. But our rules of evidence are calculated for trials before popular tribunals; and one of the first objects of the law of evidence in those courts is to exclude the admission of any evidence which may by possibility mislead the understanding of the jury.

I therefore consider such treatment only of a person by his friends or others to be admissible in evidence upon a question concerning his competency as appears to have come home to his understanding, and upon which he has been shewn in some degree to have acted; for, after all, it is not the treatment itself which is of any value, but the mode in which the party conducts himself when such treatment takes place. It is not what the third person does, or says, or writes, which furnishes of itself any indication of the state of mind of the party respecting whom the inquiry is made, but what such party himself does, or says, or writes, or how he conducts, or bears himself on the occasion; for even his refusal to act, or his silence, may, in some instances and on some occasions, furnish evidence as strong upon the state of his mind, and speak as loudly and intelligibly, as any act or answer however direct; and this I take to be in effect the rule laid down by the Court of King's Bench upon a motion for a new trial in this very case, the decision of which is reported in 6 *Neville & Manning*, 132. (a), and with which I entirely concur; and I cannot frame to myself any other general rule that is equally intelligible and capable of application to the infinitely various modes and questions of evidence which must necessarily arise and present themselves upon such a subject of inquiry.

(a) *Antè*, p. 324.

The question, therefore, I consider to be reduced to this; whether, taking into consideration the several circumstances stated in the bill of exceptions as to the finding of these letters, and the evidence contained therein of the dealing with these letters, or their contents, by the testator in his lifetime, the Judge was right in rejecting all of them as inadmissible?

In considering this question, the first thing to be observed is, we have no right to import into the case any suspicion of fraud, either with respect to the place in which these letters were found deposited, the time at which they were first discovered, or the facts attending their discovery; fraud of any kind is not to be surmised, but must be expressly found; and, if the reasoning upon the facts stated in the bill of exceptions is to be allowed in any manner to receive a bias or colouring from a suspicion of fraud, where the precise facts to support such fraud are not stated, the minds of no two individuals can expect to arrive at the same result from the same premises. The facts attending the finding of these letters might undoubtedly have been stated with more precision and accuracy; but I take the result of the statement to be, that these letters were found in a place where the testator usually kept his letters and papers in his lifetime, for they were found with many letters addressed to him by various persons, of dates extending over a considerable period of time, at the very least from 1784 to 1799, and with other papers of the testator; so that the reasonable inference is that this was his usual place of deposit of letters and papers; and a cupboard under his bookcase in his private room being a place not unusual for the safe custody of letters and papers. As to *the time* at which they were dis-

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covered, the bill of exceptions is silent; the reasonable inference, therefore, is, that they were found at the time when such matters, according to the usual course of business and ordinary experience, are searched for and found; that is, at such short and reasonable time after the death of the testator as is sufficient to arm the personal representative with an authority to search and examine the papers of the deceased.

Now, taking the three letters into consideration, and applying to them that test before adverted to, viz., whether there is sufficient evidence to shew that they came to the hands and knowledge of the testator, or that there was any dealing with them on his part, as with letters that actually came to his hands, I think with respect to the first, that is, the letter of the date of the 12th of *October* 1784, the learned Judge was right in holding that it was not admissible. It is stated, in the bill of exceptions, that to some of the letters answers had been written and sent, of which copies had been preserved in his own handwriting, and that others were indorsed by him in his handwriting, by which I understand that the name of the writer, or the date of the letter, or both, were put upon it; but that, as to the letter in question, it had neither of these indicia, from which any inference could be drawn that it had been actually submitted to his mind, or that he had ever read it at all. All that appeared was that it was open and had the seal broken; and, although it appears that another letter was afterwards sent to him from the same relative who wrote the letter now under discussion, to which he returned an answer of the date of 1st of *June* 1787, yet this subsequent correspondence does not impress my mind with the conviction that the particular letter in question must necessarily have come to his knowledge,

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or that he exercised his understanding upon it. The same observation applies still more strongly to the letter from Mr. *Ellershaw*, of the date of 3d *October* 1799, as it wants even the confirmation and support arising from the subsequent correspondence between the parties which the first letter possesses.

But, with respect to the letter dated the 20th of *May* 1786, and written by Mr. *Oliver Marton* to the testator, I think there are circumstances extrinsic of the letter itself which shew that the letter had come to the testator's knowledge, and that he had exercised so much understanding upon it as was sufficient to have authorised its admission to the jury; and it ought accordingly to have been submitted to their consideration. This letter was addressed to the testator at *Wennington*, where he resided at the date of the letter. It was found amongst the other letters and papers, after the testator's decease, at *Hornby Castle*, the place where he resided at his death. So far as the evidence goes, the letter must be taken to have been brought there, either by himself or by his orders, with his other letters; for no ground is laid in the bill of exceptions for the inference that it was brought there by any indirect means, or for any indirect purpose. The letter recommends that the attorney of Mr. *Marsden* should wait on Mr. *Atkinson* or Mr. *Watkinson*, respecting a dispute mentioned therein, and that a case should be settled by Mr. *Marsden's* and their attorneys.

This letter is found in the place and at the time before commented upon. It is found open and with the seal broken, and indorsed in the handwriting of Mr. *James Barrow*, who was at that time his attorney, with the date and name of the writer.

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The letter, therefore, must have got into the hands of the attorney of the testator, the very person who, from its contents, was not only the most proper person, but the only person in whose hands it should be placed.

The question is, whether the circumstances stated in the bill of exceptions shew a reasonable ground for the Judge to be satisfied that this letter must have reached the attorney's hands through the instrumentality in any way of the testator, — whether in any way he had acted upon it? For, if there was reasonable ground for such opinion, then the letter should not have been withheld from, but should have been submitted to, the jury, as one out of the numerous facts upon which their determination should be founded.

Now it appears to me, as I have before observed, that in the determination of this question all suspicion or surmise of fraud is to be carefully kept out of view, and the several facts stated in the bill of exceptions are to be treated as if they occurred in the course of a real and genuine transaction. The bill of exceptions states no fraud, because none appeared at the trial; and consequently the Judge who is to determine on the admissibility of the evidence is not at liberty to presume any. The first point to be observed is, that the letter gets to Mr. *Marsden* the testator, for to him it is addressed, at *Wennington*, where he then lived; and with his other letters and papers it is found after his death open, and with the seal broken. In the next place it appears that it did, in some way or other, come into the hands of Mr. *James Barrow*, the attorney of Mr. *Marsden*, the very person to whose consideration it was to be submitted according to the directions of the letter itself.

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This is the inference that is naturally to be drawn from the circumstance of the indorsement having been made by him: for upon what ground can it be said that the indorsement is found to be made on this letter in the handwriting of Mr. *Barrow*, and the indorsement on all the other letters (such as are indorsed) in the handwriting of Mr. *Marsden*, except that this particular letter was, by the subject matter of it, required to come to, or to be put into the hands of, Mr. *Barrow*, a circumstance which did not apply to any of the others? Now this letter could only get into the hands of Mr. *Barrow* (without the supposition of fraud, which is always to be excluded where none is suggested) in two ways, either by the sending of the letter by Mr. *Marsden* to Mr. *Barrow*, and his returning it back again, or by Mr. *Barrow* taking it with the assent of Mr. *Marsden*, and again returning it to Mr. *Marsden*. In any other way there must have been contrivance, or unfair dealing with the letter, on the part of Mr. *Barrow* or some other person; and, if the letter was forwarded by either of those means, it denotes a dealing with the letter by Mr. *Marsden*, which makes it admissible evidence for the jury. The objection raised against this mode of reasoning appears to be, that it is in the nature of a *petitio principii*, or an assumption of the very thing which is to be proved, viz., the rationality of Mr. *Marsden*; but I cannot feel the full weight of this objection. The Judge, who presides at the trial, by admitting this evidence is not determining, nor has he any right to determine, the question of the competency of the testator. That is a question which the jury are to decide, after the termination of a long course of conflicting evidence. All that the Judge has to determine

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is, whether a particular piece of evidence is, at a particular period of the cause, admissible for the consideration of the jury as the matter then stands; that is, with respect to this letter, whether there is reasonable evidence to satisfy his mind that it came to the testator, and that he exercised some act of judgment or understanding, though in ever so small a degree, upon it; and, as it strikes my mind that the evidence fully justifies such inference, I think this letter ought to have been admitted.

I cannot, in conclusion, but express my regret that the production of these letters was made so strong a point at the trial of the cause; for either their admission or their rejection must endanger the verdict, whilst at the same time it is obvious that their production or their absence would have very little effect indeed upon the mind of the jury. But, as the parties have thought proper to raise the question, I am bound to give my opinion as it is formed upon the facts stated in the bill of exceptions; and I think upon those facts the inference is, that the letter of Mr. *Marton* reached the testator to whom it was addressed, and that it was acted upon by him, and consequently that it ought not to have been rejected at the trial; and, on this ground, I think the judgment ought to be that of a venire de novo.

The learned Judges being equally divided
in opinion, the judgment was

Affirmed (a).

(a) This judgment was affirmed on error brought in the House of Lords, May 22d, 1838. *Wright v. Doe dem. Tatham*, 4 New Ca. 489.

END OF TRINITY VACATION.

C A S E S

ARGUED AND DETERMINED

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IN THE

Court of QUEEN's BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Michaelmas Term,

In the First Year of the Reign of VICTORIA.

The Judges who usually sat in Banc in this term were

LORD DENMAN C. J.

WILLIAMS J.

PATTESON J.

COLERIDGE J.

TAYLOR *against* DEVEY and GRAHAM.

*Saturday,
November 25th.*

TRESPASS for breaking and entering the plaintiff's dwelling-house, making a disturbance there, and continuing, &c., and breaking doors and locks, &c. Plea, Plea, to trespass for breaking and entering plaintiff's dwelling-house, that the house was in the parish of *B.*, in which there was an immemorial custom for all the parishioners to go through the house, upon their perambulations of the parish boundaries, on the *Thursday* in *Rogation* week, every third year; and justification under the custom. Issue being joined on a traverse of the custom, and a verdict found for the defendants: Held, on motion for judgment non obstante veredicto, that it could not be assumed, on this plea, that the house stood on the boundary; and that the custom was therefore bad, as pleaded.

Entries in the parish books, recording the fact that the perambulations had taken a particular line, would not be evidence upon such an issue.

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that the said dwelling-house now is, and at the said times when &c. was, and from time whereof &c. hath been, situate within, and parcel of, the parish of *St. Bridget*, otherwise *St. Bride*, in the city of *London*: that, from time whereof &c., there hath been, and at the said times when &c. there was, and now is, within the parish of *St. B.*, a certain ancient and laudable custom there used and approved, that is to say, that, during all the time aforesaid, it hath been, and still is, lawful for all and every the parishioners, for the time being, of the parish of *St. B.*, to go through the said dwelling-house in which &c., upon their perambulations of the boundaries of the parish of *St. B.*, upon *Thursday* in *Rogation* week in every third year: and that, from time whereof &c., the parishioners, for the time being, of the parish of *St. B.* have used and been accustomed, in the exercise of the custom aforesaid, to go through the said dwelling-house in which &c., upon their perambulations of the boundaries of the parish of *St. B.*, upon *Thursday* in *Rogation* week in every third year; wherefore the said defendants, being then and there two parishioners of the parish of *St. B.*, on *Thursday* in *Rogation* week, in the year 1833 aforesaid (being then and there a third year), in the exercise of the custom aforesaid, went through the said dwelling-house in which &c., upon the perambulation by the parishioners of the said parish of *St. B.* of the boundaries of the same parish, using the said custom there for that purpose and on the occasion aforesaid, as they lawfully might for the cause aforesaid: and, in order &c. (justification under the custom). The replication traversed the custom; and the defendant joined issue on the traverse.

On

On the trial before Lord *Denman* C. J., at the *London* sittings after *Michaelmas* term 1835, a verdict was found for the defendants. In *Hilary* term 1836, *Cresswell* obtained a rule nisi for judgment non obstante veredicto, on the ground that the plea, if it did not allege that the house was on the boundary of the parish, was no justification; or for a new trial, on the ground that the plea, if taken to allege that fact, was not proved; and also on the ground of a supposed misdirection (as to which see the judgment).

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Sir *J. Campbell*, Attorney-General, *Barstow*, and *G. T. White*, in *Trinity* term last (*a*), shewed cause. First: the plea does not allege that the plaintiff's house is on the boundary; nor, in fact, is it so. But the justification is nevertheless valid. In *Goodday v. Michell* (*b*) a similar justification was pleaded by way of prescription, and held ill, because it should have been pleaded as a custom which is done here. One reason of this was that parishioners cannot release. And the Court considered the defence substantially good; *Anderson* C. J. saying, "it is not to be doubted, but that parishioners may well justify the going over any man's land in their perambulation, according to their usage, and to abate all nuisances in their way." The case is cited to the same point in 16 *Vin. Abr.* 307. *Perambulation*, pl. 5. Such a custom would be useless, if maintainable only when the locus in quo is on the boundary: a boundary is a line upon which the perambulating party cannot all go. Very

(*a*) May 30th, 1837. Before Lord *Denman* C. J., *Littledale*, *Patterson*, and *Williams* Js.

(*b*) *Cro. Eliz.* 441. *S. C. Owen*, 71. : *Co. Ent.* 650 b., 651 b., *Trespas*, pl. 5.

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frequently too the line cannot be followed, on account of natural obstacles. [Lord *Denman* C. J. Must you not shew the necessity for a deviation, in your plea?] It is enough that a custom, if proved in fact, may have had a legal origin: the actual origin need not be shewn; *Pain v. Patrick* (a). Here the custom may have originated in the assent of the owner; especially if he held the land all the way up to the boundary, for he may have obstructed the way along the boundary, and have opened the other way as a compensation. Circumstances causing a necessary deviation may have ceased to exist: yet that would not make the custom bad, if once good. *Fitch v. Rawling* (b) shews that inhabitants may have a custom to play on the close of an individual: *Heath* J. there said that the lord might have made the grant before the time of memory. The custom often is for parishioners to meet within the parish at the vestry room, and to proceed thence to the boundary: a part of their route must then be not along the boundary. Besides, a perambulation often is for the purpose of ascertaining the boundary; a part of it, therefore, must be performed on what is not the line; and here the plea is that the act was done upon the perambulation. (They then argued on the supposed misdirection).

Cresswell and *W. H. Watson*, contra. In *Goodday v. Michell* (c) the plea failed; and there is no authority in favour of the custom, except an extra-judicial dictum. And, even as to that, it does not appear that the perambulation supposed was not one performed exclusively

(a) 3 *Mod.* 289. See pp. 293, 294.(b) 2 *H. Bl.* 393.(c) *Cro. Eliz.* 441. *S. C. Owen*, 71.; *Co. Ent.* 650 b., 651 b., *Trespas*, pl. 5.

· along

along the boundary. A custom authorising the whole parish to pass, without necessity, every third year, through an individual's house cannot be supported: neither is the custom made good by its being laid on a particular day only; *Reynolds' Case* (a). Customs which inroach upon individual rights are good only from necessity; as to turn a plough upon a neighbour's land, to use the sea-shore for fishing, and other similar rights, some of which are alluded to in *Blundell v. Catterall* (b). Thus, if a deviation from the boundary were made necessary by its passing through a pond, the deviation would become illegal if the pond were dried up. A deviation into a waste might not be illegal: but, if the waste became private property, and a house were built on it, a deviation through the house would be illegal. It is said that a perambulation may be for the purpose of ascertaining the boundary: but the custom is lawful only for the purpose of recording the boundary. (They then argued on the supposed misdirection.)

Cur. adv. vult.

LORD DENMAN C. J., in this term (*November 25th*), delivered the judgment of the Court.

In the course of trying the existence of a custom for all the parishioners of *St. Bride's*, on their annual perambulation of the parish bounds, to go through the plaintiff's house, though not in the line of the parish boundary, the plaintiff's counsel observed to the jury that the defendants had given no evidence of the contents of parochial books on the subject, nor any evidence of

(a) *Moore*, 916.

(b) 5 B. & Ald. 268. And see *Blewett v. Tregonning*, 3 A. & E. p. 569, &c.

reputation.

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against
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reputation (a). In summing up, I observed on this statement, and am supposed to have said that such evidence would have been inadmissible. A rule nisi has been obtained, on the ground that herein I misdirected the jury, because the existence of a public right of this nature may be proved by reputation.

We agree that, if a judge misleads a jury on any question of law, the losing party is entitled to a new trial: for the jury must be supposed to adopt the law as expounded to them, and their verdict may have proceeded on the erroneous direction: nor can any calculation be permitted of the extent to which the error may have operated.

But I am by no means clear that the observation was made in the manner supposed. My attention was not called to it at the time of the summing up; and I took no note of what I said in that particular. On the contrary, recalling what passed as accurately as I now can, I am rather inclined to believe that the evidence, which I thought would have been inadmissible, was that of entries in parish books recording the fact that the perambulations had taken a particular line. We all think that this would have been correct: and even a careful reporter might have confounded this opinion with that which was justly considered erroneous.

On this ground, therefore, no sufficient case for granting a new trial is made out. But the learned counsel for the plaintiff moved to enter judgment for him notwithstanding the plea found for the defendant, arguing that a custom to pass through a particular

(a) On this point, *Stark Ev.* part I. s. 34. (p. 54. 1st edit. See vol. i. p. 156. 2d edit.), and *Ireland v. Powell, Peake on Ev.* ch. 1. p. 16. (5th ed.), were referred to. See *Rex v. Antrobus*, 2 A. & E. 794, 5.

house

house within a parish, upon the perambulation of the boundaries, is bad in law, unless such house is upon the boundary line, so that the perambulation cannot be made without passing through the house.

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The plea, indeed, stated that the defendants went through the plaintiff's house upon the perambulation of the boundaries, "using the said custom there," which expressions might import that the house was in the boundary line. If this construction was admissible, the plaintiff would be entitled to a new trial, and ultimately to a verdict, because the plea, so understood, was disproved. But the construction cannot be adopted, the plea only averring the house to be within the parish, and the custom to be that it is lawful for all and every the parishioners to go through it upon their perambulation of the boundaries. The question, therefore, is whether the custom so laid is valid in law.

The right to perambulate parochial boundaries, to enter private property for that purpose, and to remove obstructions that might prevent this from being done, cannot be disputed. It prevails, as a notorious custom, in all parts of *England*, is recorded by all our text writers, and has been confirmed by high judicial sanction. Lord C. J. *Anderson*, and the whole Court of Common Pleas, assert the custom and the right in the most unqualified manner in *Goodday v. Michell* (a), the pleadings in which are to be found in *Coke's Entries*, 651 b. That case, indeed, appears to be the only decision in the books on the subject of parish perambulations. There the justification failed; but the defect was in the mode of pleading; for the defendant's right was thought

(a) *Cro. Eliz.* 441. *S. C. Owen*, 71.; *Co. Ent.* 650 b., 651 b., *Trespas*, pl. 5.

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to be placed on prescription, and not on custom; and, besides, the bar did not embrace all the trespasses laid in the declaration. These material faults, being pointed out and adjudged fatal, superseded the necessity for examining the plea more minutely, and enquiring whether the custom was well laid. It claims a prescriptive right to enter plaintiff's close exactly in the same manner as the defendant in this action justifies under the custom for all and every the parishioners upon the perambulation of the boundaries to enter plaintiff's house, which is averred to be within the parish. Now it is obvious that the right to perambulate boundaries cannot confer a right to enter any house in the parish, however remote from the boundaries, and though not required to be entered for any purpose connected with the perambulation: and it seems to follow that a custom on that occasion to enter a particular house, which is neither upon the boundary line nor in any manner wanted in the course of the perambulation, cannot be supported.

On principle, therefore, the custom laid is bad in law; and the authority of the case, as to the form of pleading, cannot go for much, as the plea was set aside for two fatal faults in other respects. The report contains several references to the Year-Books, and one to *Fitzherbert's Natura Brevium* (a), none of which have any bearing on this objection. The *Book of Entries* (p. 158) is also quoted; but neither in that page, nor in any other, is light thrown upon it.

For the reasons given, we think ourselves bound to give our judgment for the plaintiff.

Rule absolute for judgment non obstante veredicto.

(a) *Fitz. N. B.* 185 B.

1837.

The QUEEN *against* The Justices of RIPPON.

A BOROUGH rate, in the nature of a county rate, was made, in *October* 1836, by the council of the borough of *Rippon*, under stat. 5 & 6 *W. 4. c. 76. s. 92*. It was appealed against, at the quarter sessions for the borough; and by an order of sessions, *Easter*, 1837, the rate was quashed for reasons stated in the order. *Wortley*, in the ensuing term, obtained a rule nisi for a certiorari to remove the order into this Court.

Sect. 132 of stat. 5 & 6 *W. 4. c. 76.* takes away certiorari in the case of an order of borough sessions quashing an appeal against a rate (in the nature of a county rate) made under sect. 92.

Cresswell and *Baines* shewed cause in the same (*Trinity*) term (a). Stat. 5 & 6 *W. 4. c. 76. s. 132.* enacts "That no conviction, order, warrant, or other matter made or purporting to be made by virtue of this act shall be quashed for want of form, or be removed by certiorari or otherwise into any of His Majesty's Courts of Record at *Westminster*." Whatever, therefore, may be the merits of the case as to this order, it cannot be removed. And, supposing that the certiorari were not taken away, there is no ground here for the interposition of the Court. (The rest of the argument is not material to the decision.)

Sir *J. Campbell*, Attorney-General, and *Wortley*, *contra*. Sect. 92 of stat. 5 & 6 *W. 4. c. 76.* contains a distinct set of provisions as to the raising of a borough-rate, which is to be "in the nature of a county rate;"

(*) June 8th. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Williams J.*

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 ———
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 RIFFON.

the council are to have, within the borough, the same powers which justices in sessions have as to county-rate under stat. 55 G. 3. c. 51., as nearly as the nature of the case will admit (with certain exceptions); and, on appeal against the rate, the recorder, or the justices of the county, in quarter sessions "shall have power to hear and determine the same, and to award relief in the premises, as in the case of an appeal against any county rate." It is evidently contemplated that removal by certiorari shall be incident to the orders made in exercise of this jurisdiction, as it is to orders on the subject of county rate. Sect. 132 was not meant to affect this clause; the "conviction, order, warrant, or other matter" spoken of in that section refer to the proceedings regulated by the sections more immediately preceding, 126 to 131. The general rule is, that the writ of certiorari can be taken away only by express words. *Rex v. Eaton* (a), *Rex v. Terret* (b), and *Rex v. Rogers* (c), shew the strict construction given to clauses which exclude it. In *Rex v. Bond* (d), this Court held that the reference to stat. 55 G. 3. c. 51., in sect. 92 of the present act, made decisions on the former statute applicable to cases under this section.

Cur. adv. vult.

LORD DENMAN C. J., in this term (*November 23d*), delivered the judgment of the Court. After stating the nature of the application, his Lordship said, —

We are of opinion that the 132d section of the act takes away the writ of certiorari. It is general in its

(a) 2 T. R. 89.

(b) 2 T. R. 735.

(c) 5 B. & Ald. 773.

(d) 6 A. & E. 905. S. C., as *Rex v. The Recorder of Poole*, 1 N. & P. 756.

terms;

terms; and enacts, "That no conviction, order, warrant, or other matter made or purporting to be made by virtue of this act shall "be removed by certiorari." Now it is clear that this order of sessions is made by virtue of the act; and though, by the ninety-second section, the borough rate is to be made in the same manner as a county rate, or as near thereto as the nature of the case will admit, and a county rate may be removed, yet that consideration does not do away with the effect of the 192d section.

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against
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Borough.

Rule discharged (a).

(a) See stat. 7 W. 4. & 1 Vict. c. 78. s. 44.

The QUEEN *against* The Councillors of the Borough of DERBY.

A RULE nisi was obtained, in *Michaelmas* term 1836, for a mandamus to the councillors of the borough of *Derby*, or any two of them, to administer to *John Flewker* the declaration required by statute to qualify him for the office of a councillor of the said borough. The material facts were as follows.

The borough was divided, under stat. 5 & 6 W. 4. c. 76., into six wards, to each of which six councillors were allotted. On *December* 26th, 1835, six councillors were elected for *Castle* ward, and subscribed the

At the first election of councillors for a ward, under stat. 5 & 6 W. 4. c. 76., *A.* and *B.* were elected by the smallest numbers. At the election of aldermen immediately following, two of the councillors elected by higher numbers were chosen alder-

men. *C.* and *D.* were chosen councillors in their places, each by fewer votes than had been given for *A.* or *B.* At the time for electing councillors in the following year, *A.* and *B.* remained in office, and *C.* was elected councillor in another ward, and was admitted to the office. The candidate for that office who had had the next largest number of votes disputed the election, on the grounds that *C.* was still a councillor of the first ward, inasmuch as he had been chosen to fill an extraordinary vacancy; that this fact was notorious to the burgesses; and, consequently, that the votes given for *C.* in the second ward were thrown away. A mandamus was therefore moved for to swear in the opposing candidate. Held that, assuming the objections to be well founded (on which the Court did not decide), a mandamus could not go, the office being full, and being one for which a quo warranto might be brought.

E e 2

declaration

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 ———
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 against
 The
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 DERBY.

declaration required by sect. 50 of the act. *Harwood* and *Johnson* had the lowest number of votes. On *December* 31st, 1835, *Strutt* and *Forester*, two of the councillors so elected, were chosen aldermen. On *January* 9th, 1836, *Tunnicliffe* and *Lowe* were elected councillors to fill up the number required for *Castle* ward. *Tunnicliffe* had the largest number of votes, but he, and also *Lowe*, had fewer votes than had been given for either *Harwood* or *Johnson*. On *November* 1st, 1836, *Harwood* and *Johnson*, as the present applicant contended, should have gone out of office ; but they continued on and after that day to act as councillors. On the same 1st *November* an election of two councillors took place for *Becket* ward. *Tunnicliffe* and *Flewker*, the present applicants, were two of the candidates. One *Gadsby* was highest on the poll, *Tunnicliffe* second, and *Flewker* third. *Gadsby* and *Tunnicliffe* were declared duly elected, and were admitted councillors. *Flewker* contended that *Tunnicliffe* was incapable of being elected, being already, under the circumstances above stated, a councillor of *Castle* ward ; which fact, as he alleged, was well known to the burgesses. *Flewker* tendered himself at the *Guildhall* to subscribe the declaration as a councillor of *Becket* ward, but was rejected ; and he also attended the first meeting of the council after the election, proposing to make the declaration, and to act as councillor, but was not permitted to do so. In last *Trinity* term (a),

Sir *J. Campbell*, Attorney-General, shewed cause against the rule, which was supported by *Whitehurst*.

(a) *June* 9th. Before Lord *Denman* C. J., *Littledale*, *Patteson*, and *Williams* Js.

The

The points discussed were; 1. Whether the vacancy in *Castle* ward, occasioned by the election of *Strutt* and *Forester* to be aldermen, was an ordinary vacancy, in which case, by sects. 30 and 31 of the act, *Tunnickliffe* and *Lowe* were the proper councillors to go out of office on *November* 1st, 1836, as having been elected by the smallest number of votes; or an extraordinary vacancy, in which case, by sect. 47, they were to continue in office as long as those parties would have remained in whose room they were chosen. — 2. Whether, assuming that *Tunnickliffe* was incapable of being elected for *Becket* ward, that fact was notorious to the burgesses; and, if so, whether that notoriety was equivalent to express notice, and rendered the votes given for *Tunnickliffe* a nullity, leaving *Flewker* second on the poll. To this point *Rex v. Hawkins* (a), and the dictum of Lord *Mansfield*, in *Rex v. Blissell* (b), were cited.—3. Whether a motion for a mandamus was proper in this case, the office being full de facto. On this point *The Attorney-General* cited *Rex v. The Mayor of Oxford* (c). *Whitehurst* contended that a mandamus might properly go, the object being merely to compel the doing of a ministerial act by which the present applicant might be enabled to try the right; and he cited *Carpenter's Case* (d), and *Rex v. The Archdeacon of Middlesex* (e).

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The QUEEN
against
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Councillors of
DEBRY.

Curr. adv. vult.

(a) 10 *East*, 211.

(b) 1 *Roe on Elections*, 279. 2d ed. S. C. (not same dictum) 1 *Doug.* 398, note (22).

(c) 6 *A. & E.* 349. S. C. 1 *Nov. & P.* 474. And see *Rex v. The Mayor of Winchester*, ante, p. 215.

(d) *Sir T. Ray*. 439. (e) 3 *A. & E.* 615. S. C. 5 *Nov. & M.* 494.

1837.

The QUEEN
against
The
Councillors of
DERBY.

Lord DENMAN C. J., in this term (*November 23d*), delivered the judgment of the Court. After stating the nature of the application, his Lordship said, —

The case appeared to involve several questions, certainly of considerable difficulty, in the construction of the act of parliament with respect to the time and manner of supplying extraordinary vacancies in the office of councillor : but it is not necessary to come to any decision upon those questions, inasmuch as the Court is of opinion that, whatever view be taken of them, this rule cannot be made absolute.

The motion was made upon the ground of a supposed ineligibility in one of the other candidates, *Mr. Tunnicliffe*, who had more votes than *Mr. Flewker*, and was declared elected according to the form prescribed by the thirty-fifth section of the act, and has been admitted a councillor ; the office, therefore, is full in fact, and the remedy to try whether it be full in right is by *quo warranto*. The case is not like that of a disputed election of churchwardens, respecting whose office a writ of *quo warranto* will not lie ; and there is no necessity to administer the declaration in order to enable *Mr. Flewker* to try the validity of *Mr. Tunnicliffe's* election. It will be time enough hereafter to consider whether such a *mandamus* as is now prayed for can be granted, if *Mr. Flewker* should succeed by a proper course of proceedings in ousting *Mr. Tunnicliffe*, and should afterwards meet with any opposition in making the declaration and being admitted into the office which he claims.

Rule discharged with costs.

1837.

Ex parte The Inhabitants of BROSELEY.

Thursday,
November 2d.

TWO justices removed *Mary Mason*, the widow of *Edward Mason*, from the parish of *Broseley*, in the borough of *Wenlock*, to the parish of *Eaton* in *Shropshire*. The order was made on the examinations of *Thomas Smith* and of *Mary Mason*; the former of whom stated that he hired *Edward Mason*, in 1813, to be his servant, and that *Mason* served under such hiring, in *Eaton*, for a year (a). The parish of *Eaton* appealed to the *Shropshire* quarter sessions, on the ground, as stated in the notice, "that there was in fact no such hiring or service for a year as in the examination of *Thomas Smith* in this case is stated." On the hearing of the appeal, *Thomas Smith*, who was the first witness for the respondents, proved the hiring to have been in 1810, and not in 1813: upon which the sessions, without hearing further evidence, held the variance fatal, and quashed the order. The respondents applied for a case, which was refused. It was not alleged, at sessions, that the mistake in the examination had deceived or misled the appellants.

Archbold, on affidavit of the above facts, moved for a mandamus to the justices to enter continuances and hear the appeal. The settlement proved was substantially the same as that set forth in the examination, within the spirit of sect. 81 of stat. 4 & 5 W. 4. c. 76. The state-

An order of removal to *E.* was made upon an examination stating a hiring in 1813 and a service in *E.* under such hiring. On appeal, upon the ground that there was no such hiring, the respondents proved a hiring in 1810; upon which the sessions refused to go on with the case, and quashed the order. Mandamus to enter continuances and hear the appeal refused: 1. Because the sessions had in fact heard; 2. Because the variance was material, under stat. 4 & 5 W. 4. c. 76. s. 81.

Although it was not alleged that the appellant parish was in fact misled.

(a) It did not appear from the affidavit that any other evidence of the hiring and service was given before the two justices.

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Ex parte
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ants of
BROSLEY.

ment in the examination is now in the nature of a bill of particulars. "An erroneous date to a bill of particulars, which is not calculated to mislead the defendant, will not preclude the plaintiff from recovering his demand;" 1 *Tidd's Practice*, 599 (a). A stricter rule would be hard on parishes: for the statements of paupers, upon whose examinations the orders of removal must usually be founded, will seldom be precisely accurate as to dates and other minute details. *Rex v. The Justices of Cornwall* (b) shews that a notice of appeal need not explain the nature of a settlement to be set up by the appellants. The sessions have refused to hear the case, or have heard it only in part: the Court will therefore grant a mandamus, as in *Rex v. The Justices of Cornwall* (b), and *Rex v. The Justices of Cumberland* (c).

Lord DENMAN C. J. In *Rex v. The Justices of Cumberland* (c) the sessions thought they had no jurisdiction, and declined to hear. Here the sessions heard; and, besides, I think they decided rightly. Such a variance might mislead materially: it cannot be necessary to shew that parties were in fact misled. *Rex v. The Justices of Cornwall* (b) has been questioned (d). In that case, I certainly thought that the notice stated the grounds of appeal sufficiently. The Court, in a later case, took a view inconsistent with this, considering that such a notice, though a formal compliance with the statute, was too loose, and did not furnish sufficient information. I think the latter opinion the more satisfactory one.

(a) 9th ed.

(b) 5 A. & E. 134.

(c) 4 A. & E. 695. See *In the Matter of Pratt*, ante, p. 27.(d) See *Rex v. The Justices of Derbyshire*, 6 A. & E. 885.; *Rex v. Holbach*, 5 A. & E. 685.; *Rex v. Misterton*, 6 A. & E. 878.

PATTESON J. I think this case has been decided; and I doubt whether, if the sessions were wrong, this Court would interfere. But I think that they were not wrong. The intention of the clause will be best effectuated by construing it strictly. If the pauper or the parish suffer from an inaccuracy of this sort, it is an accident, which arises from wrong information having been relied upon. *Rex v. The Justices of Cornwall* (a) was a very peculiar case. The question related to the settlement of the children by a former husband: and the notice was considered to give the respondents a full understanding of all that the appellants meant to try.

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—
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ants of
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WILLIAMS J. The sessions have decided this case already. But I am by no means satisfied that their decision was wrong. I think the statute should be strictly pursued, and that the settlement proved was different from that stated in the notice.

COLERIDGE J. *Rex v. Holbeach* (b) decided that a variance between *Spalding* feast and *Holbeach* fair was material, inasmuch as it might deceive: and we thought the sessions right in refusing the evidence. So here, a settlement proved under a hiring in 1810 is materially different from the alleged settlement under a hiring in 1813.

Rule refused.

(a) 5 A. & E. 134.

(b) 5 A. & E. 685.

1837.

Thursday,
November 2d.

POWELL, HUGHES, and PROTHERO, *against*
REES, Administratrix of JOHN REES.

An administrator is liable to an action for money had and received by the intestate, for coal tortiously taken by him from the plaintiff's land, if the intestate has sold it and received the money.

And this, although no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale.

And, where part has been raised more than six months before the intestate's death, and part within six months, the plaintiff may bring trespass, under stat. 3 & 4 W. 4. c. 42. s. 2., for so much as was raised within the six months, and also money had and received for so much as was raised before; the acts being distinct, and therefore the two actions not incompatible.

ASSUMPSIT for money had and received by the intestate to the use of the plaintiffs, and on an account stated between the intestate and the plaintiffs; with promise by the intestate. Plea, non assumpsit; with another plea not material here.

On the trial, before *Coleridge J.*, at the last *Monmouthshire* assizes, the facts (so far as material to the point here reported) were as follows. The intestate had been lessee under the plaintiffs of certain coal mines; the minerals under three closes had been excepted from the demise, but he had worked them, brought the coals to the market, and received the produce. The plaintiffs had sued the defendant in trespass, after the intestate's death, and recovered damages for the coals abstracted within the six months next preceding that event, availing themselves of the remedy given by stat. 3 & 4 W. 4. c. 42. s. 2. The present action was brought to recover damages for the proceeds of the sales of coals by the intestate from under the excepted closes, for the period antecedent to the six months before mentioned (a). No direct evidence of the amount obtained by the intestate for the coals was given. It appeared that they had been mixed with coals taken from the mines demised, and all sold together. The plaintiffs relied on the evidence of surveyors as to the quantity of coal which

(a) The facts, thus far, are stated as in the judgment delivered by the Lord Chief Justice on the present motion.

had

had been excavated. The defendant's counsel objected that the action did not survive against the administratrix under these circumstances; and that, at any rate, the action of trespass which had been brought was inconsistent with the present action. The learned Judge reserved leave to the defendant to move for a nonsuit; and the plaintiff had a verdict for the sum which the jury considered to be the value of the coal taken, deducting for the expense of raising and conveying it to market.

1837.

 POWELL
 against
 REES.

Talfourd, Serjt. now moved according to the leave reserved. The first question is, whether, generally, money had and received can be maintained against an administrator upon such a tort committed by the intestate, or whether it be a personal action which expires with the person. It is true that, in many instances of tort, the party injured is permitted to waive the tort, and to proceed for the money obtained by the tortfeasor, affirming his act. This point is discussed in *Hambly v. Trott* (a). But here there was no evidence of the actual price (b), which seems necessary to the action for money had and received; *Harvey v. Archbold* (c). Again, this was, substantially, an action for an injury to the freehold: and it has never been held that such injuries can be treated as contracts. The statute 3 & 4 W. 4. c. 42. s. 2. seems to shew that the legislature considered trespass to be the only remedy; otherwise the provision there would have been unnecessary. Secondly, the plaintiffs, by proceeding under the statute, have

(a) 1 Cowp. 371.

(b) The motion was also made on the ground of the absence of direct evidence of any sale; but the Court held that the jury might infer it.

(c) 3 B. & C. 626.

elected

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 against
 REE.

elected to treat the act of the intestate as a trespass. They cannot now waive the tort; and, if not, they cannot bring the action for money had and received, which assumes that the act of the tort-feasor is affirmed.

Cur. adv. vult.

Lord DENMAN C. J., in this term (November 9th), delivered the judgment of the Court.

In this case, we disposed of one ground, on which a rule for entering a nonsuit was sought to be obtained, upon the hearing. It remains to decide upon another, which arose under the following circumstances. (His Lordship then stated the facts, as at p. 426, *antè*.)

It was objected, in the first place, generally, that no such action was maintainable; that the foundation of it was a tort, the remedy for which died with the person; and that the doctrine of waiving the tort and suing upon a contract implied by law, could not be extended to a case in which no remedy by action in tort existed to be waived. We were pressed, too, by the remark that such an action was of the first impression, and by the inference to be drawn from the language of the section above mentioned, and from the remedy there given. If, however, the legal principles upon which the action is maintainable are clear, these considerations ought not to prevail. In the present case, the money which has been produced by the sale of that which had been wrongfully severed from the plaintiffs' estate, and converted into chattels, is traced into the pocket of the intestate: it cannot be doubted that an action for money had and received would have been maintainable against him for that money. His personal estate has come to the hands of the defendant, by so much increased; and

we

we cannot see any grounds why the same action is not to be maintained against her who represents him in respect of that estate.

In the case of *Hambly v. Trott* (a) Lord *Mansfield* very fully considers this subject, and lays down the distinctions which arise, as to the surviving of remedies, upon the cause of action, and the form of action. He observes (b) that there "is a fundamental distinction. If it is a sort of injury by which the offender acquires no gain to himself at the expense of the sufferer, as beating or imprisoning a man, &c. there, the person injured has only a reparation for the *delictum* in damages to be assessed by a jury. But where, besides the crime, property is acquired which benefits the testator, there an action for the value of the property shall survive against the executor. As for instance, the executor shall not be chargeable for the injury done by his testator in cutting down another man's trees, but for the benefit arising to his testator for the value or sale of the trees he shall." The former part of this example illustrates the operation of the recent statute: in the latter, which is the present case, it was not needed.

But it was pressed on us, secondly, that, at all events, this action was not maintainable after recourse had been had to the statute first referred to; for that the plaintiffs, having elected to proceed for damages for the trespass in part, could not split it and sue in contract for the other part. The conduct of the plaintiffs may have been vexatious; but that furnishes no legal answer to this action, because, in truth, the intestate was guilty of a series of trespasses, and not of one single wrongful act.

(a) 1 *Cowp.* 371.

(b) 1 *Cowp.* 376.

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against
Rex.

The plaintiffs, therefore, have only pursued different remedies for different injuries : they might indeed have recovered a compensation for all under the present form of proceeding, but they were not bound to do so.

Upon the whole there must be no rule.

Rule refused.

Friday,
November 3d.

The QUEEN against JONES.

Before the passing of stat. 7 W. 4. & 1 Vict. c. 78., a rule nisi was obtained for a quo warranto information against a party elected assessor of Carnarvon, since 25th December 1835, on the ground that the party presiding at the election as mayor had no title.

After the passing of the act, the defendant not having paid the costs of the proceeding up to that time, the Court made the rule absolute.

Sect. 1 of stat. 7 W. 4. & 1 Vict. c. 78., which cures certain defects

in municipal elections, is subject, so far as relates to proceedings commenced before the passing of the act, to sect. 20, which provides for the discontinuance of such proceedings only on payment of costs.

ON 1st March 1836, Jones was elected an assessor of the borough of Carnarvon, under the Municipal Corporation Act, stat. 5 & 6 W. 4. c. 76. s. 43. A rule nisi was obtained for a quo warranto information against him for exercising the office. Several objections were made to the defendant's title ; but the discussion turned upon the point, that the election had been held before a person claiming to be mayor, whose title to the office was bad.

Sir W. W. Follett and R. V. Richards, now shewed cause (a). It must be admitted that the election cannot be supported, unless by stat. 7 W. 4 & 1. Vict. c. 78. Sect. 1 of that statute enacts that all elections made since 25th of December 1835, in any borough named, &c. (among which is Carnarvon), "shall be good to all intents and purposes, notwithstanding any defect in the title or want of title in the person" presiding at such election. It is true that

(a) In this and two other cases from the same borough, raising the same points, *Regina v. Potter* and *Regina v. Owen*.

this

this enactment is made "subject and without prejudice to the provisions for discontinuing proceedings," contained in sect. 20, and that section enacts "that every proceeding commenced before the passing of this act" (17th *July* 1837), "and still pending in the Court of King's Bench against any person upon any ground on which it is herein declared that the validity of the election into any corporate office shall not be questioned, or for the purpose of bringing into question the validity of any election or act which is herein declared to be good, shall be discontinued immediately upon the passing of this act, upon payment of the costs incurred up to that time; and the prosecutor or relator shall be entitled to receive from the defendant in every such proceeding all such costs, to be taxed as between attorney and client, according to the practice of such Court." It will be argued that these proceedings can be discontinued only on payment of costs by the defendant. But sect. 1 makes the election good to all intents and purposes; and it cannot be implied that all elections in which proceedings have been commenced are to be excepted, merely because the enactment in sect. 1 is to be "subject" to the provisions of s. 20. Even if this rule be made absolute, no judgment of ouster can be obtained. In many cases the defendants may have a good title independently of the act, and ought not to pay costs under a provision of which they do not avail themselves. Where it is intended that there shall be an exception as to all actions already commenced, the legislature expressly makes the exception, as in stat. 54 G. 3. c. 54. s. 10., and stat. 5 & 6 W. 4. c. 2. s. 1. The two sections, taken together, may be construed as an enactment that proceedings shall
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be discontinued on the application of either party, reserving to the relator a power to apply to the Court for costs. Here he has not done so.

Sir *J. Campbell*, Attorney-General, and *Jervis*, contra. The meaning of the two sections, taken together, is, that the elections shall be valid, but that, where proceedings have been commenced, the enactment, as to them, shall be subject to the provision for payment of costs to the relator. The defendant here not having paid costs, the proceedings must go on, and the rule be made absolute.

LORD DENMAN C. J. The Court suspended its judgment in this case, hoping that the difficulty in it might be removed by the statute which was expected to be passed: but that statute, instead of removing the difficulties, has created new ones; a result not unlikely to arise from *ex post facto* laws. The act says that the proceedings shall be discontinued upon payment of costs. That, I think, is a condition; the defendant may have them discontinued, if he thinks proper to pay the costs. He may say, I think my title good independently of the act, and I will not pay costs. There is therefore one case in which the provision for discontinuing cannot take effect. I am sorry to say that the rule, here, must be made absolute.

PATTESON and WILLIAMS Js. concurred.

COLERIDGE J. To say that a defective election is cured by sect. 1, absolutely and unconditionally, without reference to sect. 20, would be a monstrous inconsistency.

sistency. It is not enacted, in terms, that a defendant is to come in on payment of costs, but we must give a reasonable interpretation to the two sections; and, doing so, I think that the condition of discontinuance is the payment of costs. The question here arises at an early stage of the proceedings; but suppose the case had gone on to trial, and that nothing remained except judgment; it would be a strange consequence of the act, if the defendant could say to the relator, "Your hands are tied and I will take no step."

Rule absolute (a).

(a) See the next two cases.

The two following cases may conveniently be added here.

The QUEEN *against* WILLIAM LLOYD ROBERTS. [Wednesday, May 2d, 1838.]

QUO WARRANTO information, of *Hilary* term 6 *W.* 4., for exercising the office of an alderman of *Carnarvon*. Plea, of *Trinity* term 1836: (after protesting that the information was insufficient in law, &c.): "Yet for plea, as to using and exercising, on" &c., "and from thence continually afterwards to the time of exhibiting the said information, and having there used," &c., "and still there using," &c., "the office of an alderman of the said borough, and, for and during all the time above-mentioned, having there claimed, and still

A defect in the first election of aldermen for a borough, under stat. 5 & 6 *W.* 4. c. 76., by reason of which (as is alleged) the proper number was not elected, is cured by stat. 7 *W.* 4. & 1 *Vict.* c. 78. s. 2.

Where a defect of title has been so cured after proceed-

ings in quo warranto commenced, such proceedings are not actually discontinued by virtue of sect. 20; but a right immediately accrues to apply for a discontinuance on payment of costs by defendant to prosecutor. Either party may make the application.

And it is too late to apply if the proceedings have been allowed, after the passing of the act, to go on to a decision, as a judgment of the Court on demurrer.

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there claiming, to be an alderman of the said borough, and having used and enjoyed all the liberties, privileges, and franchises to the office of an alderman of the said borough belonging and appertaining, as in the said information mentioned, he says that he, the said *William Lloyd Roberts*, to wit on "31st December 1835, "being on the burgess list of the said borough, and being then duly qualified to be elected an alderman of the said borough, according to the provisions of a certain act of parliament made and passed," 5 & 6 W. 4., "entitled" &c., "was then and there duly elected an alderman of the said borough, according to the provisions of the said act of parliament, and then and there duly made and subscribed the declaration in that behalf, and by the said act of parliament, required. And the said *W. L. R.* further says that, being so duly elected as aforesaid, and having so made and subscribed the declaration as aforesaid, he did thereupon use and exercise, and thence continually afterwards to the time of exhibiting the said information did use," &c., "and still doth there use," &c., "the said office of alderman of the said borough, and during all the time aforesaid hath there claimed, and yet doth there claim, to be an alderman of the said borough, and to have, use, and enjoy all the liberties, privileges, and franchises to the office of an alderman of the said borough belonging and appertaining, as in the said information mentioned, as he lawfully might for the cause aforesaid: and this" &c. (Verification, and conclusion in the common form). Replication, that, before the supposed election &c., viz. 26th December 1835, being the day for the first election of councillors under the act, eighteen persons (the number mentioned in the act) were elected councillors of the borough

borough (being the first councillors elected), and that, on the occasion of the supposed election of *W. L. Roberts*, viz. 31st December 1835, sixteen only of the said eighteen persons met for the purpose of electing the aldermen. That on that occasion there were twelve candidates (naming them); and the said sixteen &c., assembled &c., gave their votes for the said twelve candidates as follows, viz.; for the said *W. L. Roberts* nine votes; for *R. G.* nine votes; for eight other candidates (severally named) eight votes respectively; and for the remaining two seven votes each. That *W. L. Roberts* was not elected save on the occasion and in the manner aforesaid: and so the replication alleged that, at the time and on the occasion of the said supposed due election of *W. L. R.*, six aldermen, being the number required by the act for the said borough, were not elected, without this, that *W. L. R.* was duly elected &c., in manner and form &c. Verification. General demurrer and joinder. The objection stated in the margin of the demurrer-book was that, at the time of the supposed election, six aldermen were not elected.

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Jervis, in support of the demurrer. The objection is, that only two aldermen appear to have been elected, the candidates who have respectively the next largest number of votes being eight, and having equal numbers. But objections of this kind are specifically met, and cured, by stat. 7 *W.* 4. & 1 *V.* c. 78. s. 2. (a), which section

(a) Stat. 7 *W.* 4. & 1 *Vict.* c. 78. s. 2. enacts, "that all elections duly made or other acts duly done since the said 25th day of *December* at any meeting of the council or councillors of any borough named in either of

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tion is independent of the provision as to discontinuance in sect. 20 of the same act. He also insisted that the election was valid under stat. 5 & 6 *W. 4. c. 76.*

R. V. Richards, contra, argued that the error pointed out was a defect in the original constitution of the borough, and was not cured by stat. 7 *W. 4. & 1 V. c. 78. s. 2.*, that clause applying only to invalid proceedings after the borough was constituted: and that, until there had been a proper election of aldermen by the councillors, the "borough" spoken of in that clause could not be said to exist.

Jervis, in reply, was stopped by the Court.

Lord DENMAN C. J. We need not consider the state of this question under stat. 5 & 6 *W. 4. c. 76.*, if the later act has cured the defect complained of. No such case under the former act will arise again. It is clear that the new statute was passed with reference to this, among other difficulties. Some ambiguity does indeed remain, but the word "councillors" points out the meaning. It is unnecessary to consider what act of the "council" is contemplated by sect. 2 of stat. 7 *W. 4. & 1 V. c. 78.*; there is no act that could be done by the "councillors," as distinguished from the council, except the election of aldermen. The election is therefore made valid by the late statute.

the schedules of the said act by a majority of the members of the council or councillors present at such meeting, the whole number present not being less than one third part of the number of the whole council, shall be good notwithstanding that the whole or due number of aldermen may not have been then elected."

LITLEDALÉ

LITLEDALE J. I am of the same opinion. As to the observation that there is no "borough" till the corporation is formed in all its parts, I think we cannot here give the word that extended sense. It is sufficient that the place is a borough mentioned in the schedule.

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PATTESON J. Whatever doubt might have existed under the original act as to this election, there is none under the later statute. In sect. 2 "council" and "councillors" are spoken of in contradistinction, as in stat. 5 & 6 W. 4. c. 76. s. 25. And the first election of aldermen is the only occasion on which the "councillors" can ever elect.

COLERIDGE J. concurred.

Judgment for the defendant.

R. V. Richards then applied for costs under sect. 20 of stat. 7 W. 4. & 1 Vict. c. 78., but

The Court were of opinion that the costs followed the judgment in the usual course.

In the same term, *May* 10th, upon affidavit, stating that no application had been made for a discontinuance of proceedings, nor any notice given by the defendant, before arguing the demurrer, that the question thereby raised was set at rest by stat. 7 W. 4. and 1 Vict. c. 78., and that the defendant would rely on that act.

Sir *W. W. Follett* moved for a rule to shew cause why the defendant should not pay the costs as between attorney and client, and why proceedings on the judgment should not be stayed in the mean time, or why the judgment to be entered up for the defendant should not

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order such costs. If the defendant meant to avail himself of the act, he ought to have applied for the proceedings to be discontinued, which would have been granted only on his paying the costs. His omission ought not to prejudice the relator, who could not discontinue, since he had no power of forcing the defendant to elect whether or not he would avail himself of the statute. If neither party is to apply, but the act of itself discontinues the proceedings, then of itself it imposes the costs on the defendant. Suppose the parties had gone to trial on both questions, the title independently of the statute, and the defence under the statute; and the first question had been decided against the defendant, and the second for him; the intention of the legislature could have been fulfilled only by giving judgment for the defendant, but making him pay the costs as between attorney and client.

Lord DENMAN C. J. Sect. 20 enacts that the proceeding shall be discontinued *immediately* upon the passing of the act, on payment of costs. We have already, in *Regina v. Jones (a)*, held this to mean only that there is, immediately upon the passing of the act, a right to discontinue, not a discontinuance *ipso facto*. Either party may make the application. If the prosecutor did so, and there were a doubt whether the defendant would not rely upon his title as it stood independently of the act, we should call upon the defendant for his answer as to this, and so the clause might be put into operation. But, as both parties here have let the proceedings go to an end without applying for a discontinuance, the section does not operate.

(a) *Ante*, p. 430.

LITTLEDALE J. The statute does not, of itself, put an end to the proceedings. If the enactment had been that there should be no further proceedings, that would have stopped them at once; but the word "discontinued" shews that one of the parties is to act. Either might apply; and this should be done in a reasonable time after the passing of the statute. Here neither party has applied; but the case has been put into the Crown paper and allowed to take its course.

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PATTESON J. Although sect. 2 contains no reference to sect. 20, such a reference must be understood, because sect. 20 afterwards speaks of every proceeding "upon any ground on which it is herein declared that the validity of the election into any corporate office shall not be questioned, or for the purpose of bringing into question the validity of any election or act which is herein declared to be good." This Court has decided that sect. 20 does not, of itself, discontinue the proceeding; and it would be impossible to hold that it does; for there may always be a question, which either party may raise, whether the case be within the act. But no difficulty can arise from holding that either party may apply for a discontinuance. The relator must know what his objections to the title are, and whether the act cures them: he may, if he pleases, apply to discontinue and receive costs; and, if the defendant resists the application on the ground that he means to defend his title without having recourse to the act, but does subsequently take advantage of the act, he will have to pay costs as between attorney and client. If the defendant wishes to stop the proceedings earlier, relying on the act, he may apply for a discon-

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tinuance, upon his payment of costs. If neither applies, and the case goes on to judgment, it stands independent of the act, and the ordinary rule prevails. For it is open to either party to say that the act does not apply; and here the relator did so contend.

COLERIDGE J. The meaning of sect. 20 is not free from doubt; but clearly the act does not itself discontinue the proceedings. For the words "upon payment of the costs" imply a condition; and non constat that the condition will be accepted. The relator might have applied earlier. It is said that he perhaps could not know whether the defendant would rely on the act; but, first, if it be the relator's business to apply, he should do so, and cannot afterwards, in default of so doing, avail himself of the provision. Secondly, and principally, the relator must know whether he have a case with which he can go on; and, if he has not, it is his business to discontinue.

Rule refused (a).

(a) See the next case.

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The QUEEN *against* WILLIAM ROBERTS.[Wednesday,
June 13th,
1838.]

IN this case a quo warranto information had been filed against the defendant for exercising the office of mayor of *Carnarvon*. The objection to his title turned upon the objection to those of the aldermen, stated in *Regina v. W. L. Roberts*, antè, p. 433. The pleadings had gone on to a replication, which was filed in, or as of, *Trinity* term 1836. After the decision of this Court on the demurrer in *W. L. Roberts's* case, a rule was obtained calling on the defendant to shew cause why proceedings should not be discontinued on payment of costs to the relator, as between attorney and client.

If a quo warranto information has been filed on account of a defect of title which is afterwards cured by stat. 7 W. 4. & 1 Vict. c. 78., and the prosecutor does not apply for a discontinuance immediately on the passing of the act, and further costs are afterwards incurred, the Court, on a subsequent application (before the case is finally decided), will allow him to discontinue, but with costs only down to the passing of the act.

Jervis now shewed cause. This objection is cured by stat. 7 W. 4. & 1 Vict. c. 78. s. 2., which is not, like sect. 1, over-ridden by sect. 20. At all events, the motion should have been made immediately on the passing of the act; it is unjust to carry on the cause till it is almost ripe for decision, and then call upon the defendant for all the costs down to that period. The costs become due either on the passing of the act, or on a discontinuance by the relator immediately after its passing. No subsequent costs should be allowed. The defendant here may insist that his title is good, independently of the late act. If so, the Court will not make the defendant pay costs; for, if the statute had not passed, and

Although the reason of the delay was, that the question, whether or not the act made the title good, was depending in another case which would govern the present, and the prosecutor applied as soon as possible after that case was decided.

On motion by prosecutor, as above, for a discontinuance, the Court refused to allow him costs of the application.

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the case had proceeded to judgment, the defendant would have been entitled to his costs. Again, if the defendant refuse to avail himself of the statute, by rejecting the condition of paying costs, the Court is still bound to take notice that the objection is cured by the statute, and the defendant will be entitled to judgment, and to costs in course, according to the decision in *Regina v. W. L. Roberts (a)*.

Sir *W. W. Follett*, *contra*. The last decision in *Regina v. W. L. Roberts (b)* has certainly decided that, where a quo warranto information has been brought on a defect of title, since cured by stat. 7 *W. 4.* & 1 *Vict. c. 78. s. 2.*, it lies upon the prosecutor to move for a cessation of proceedings, if he wishes to entitle himself to costs under that act. It would, in most cases, be unjust that a party who commenced proceedings when there was a good objection to the title should lose any part of his costs when that title is made good by a subsequent act. The costs, generally, ought to be taxed down to the time when the prosecutor applies; if it is suggested that any part of them has been forfeited by laches, that is a question for the Master. But here the prosecutor did apply as soon as the decision in *Regina v. W. L. Roberts (a)* made it clear that a discontinuance was necessary.

Lord DENMAN C. J. I agree that the relator is, by the statute, entitled to costs down to the time of his application to the Court. But that is an application immediately on the passing of the act. He is not to wait for the purpose of seeing what the Court will do in a particular case. He ought to know the law.

(a) *Antè*, p. 437.

(b) *Antè*, p. 437. See *Regina v. Jones*, *antè*, p. 430.

LITTLEDALE J. The relator is obliged to contend that costs are given him by the act down to the time of his actually discontinuing. But he ought to have taken his step without delay. If he deferred it to await the judgment of the Court in another case, we cannot help that.

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PATTESON J. We cannot get rid of the express words of sect. 20, "shall be discontinued immediately upon the passing of this act." If the act had entitled him to discontinue without any previous step, the result, as to costs, would have been the same as it is here (a).

Sir *W. W. Follett* then contended that the prosecutor ought to have his costs of the present application.

Jervis, contra. This is a collateral proceeding; the provision for costs does not extend to it.

Per Curiam,

"Ordered, That the proceedings in this prosecution be immediately discontinued, upon payment of costs to the relator, as between attorney and client. And it is further ordered, that the coroner and attorney of this Court do tax the costs of the said relator, as between attorney and client, up to the time of the passing of the statute, passed in the first year of her present Majesty's reign, chapter 78: and that the defendant do pay such costs, so taxed as aforesaid, to the said relator or his attorney, pursuant to the said statute."

(a) *Williams J.* had left the Court.

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Saturday,
November 4th.

SIBLEY *against* FISHER.

Declaration on a bill of exchange drawn 10th December, by indorsee against indorser; issue on the indorsement. The bill, when produced at the trial, to prove the indorsement, appeared to have been altered, in the date, from 15th December to 10th December. Held, that, on this issue, the indorsement might be read without previous proof that the alteration was made before the bill was negotiated.

ASSUMPSIT. The declaration stated that *John Smith*, on 10th December 1836 (a), made his bill of exchange, directed to *John Smith* the younger, payable to his, the drawer's, own order, for 26*l.* 11*s.*, at three months after date; that *John Smith*, the drawer, indorsed to the defendant, the defendant to *Joshua King*, *King* to *Dakin*, *Dakin* to *Handley*, and *Handley* to the plaintiff; and that the drawee did not pay on presentment at maturity, &c. Pleas, 1st, 2d, 3d, 4th, tendering issues respectively on the indorsements of the defendant, *King*, *Dakin*, and *Handley*: and issues thereon. There were also other issues, not material, which were found for the plaintiff.

On the trial before Lord Denman C. J., at the *Middlesex* sittings after last *Trinity* term, the bill was produced for the purpose of proving the indorsements. It corresponded with the declaration, except that the date appeared to have been altered from *December* 15th to *December* 10th. The defendant's counsel contended that the bill could not be read, even for the purpose of proving the indorsements, until the alteration was accounted for, and shewn to have been made before the bill was issued. The plaintiff's counsel contended that the drawing of the bill, as stated in the declaration, was admitted. The Lord Chief Justice, being of this opinion, over-ruled the objection; no evidence on the sub-

(a) There was no *videlicet*.

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ject was given for the plaintiff; and, the indorsements having been proved, and evidence given by the defendant to shew that the alteration was after the issuing, his Lordship left it to the jury to say whether the alteration had been made before or after the issuing. The jury found that the alteration was made before the issuing; and the plaintiff had a verdict.

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Jervis now moved (a) for a rule to shew cause why the verdict should not be set aside, and a nonsuit entered. It will be conceded, as a general rule, that he who produces and seeks to use a bill of exchange or promissory note in evidence is bound to explain any apparent important alteration, and to shew that it was made before the instrument was negotiated. An important alteration after negotiation makes the bill or note a new and different instrument; and the stamp, having done its office upon the first instrument, is, upon the alteration, as it were removed from the paper, and the new bill or note is virtually unstamped; *Chitty on Bills*, 207, &c. (b). The onus of proof lies upon him who would use the evidence; *Bishop v. Chambre* (c); and with reason; for in common prudence he who takes an altered instrument should inquire into the circumstances, and be prepared to prove them when required. It was said, however, that the form of this record alters the question, and relieves the plaintiff from the proof. It is true that the defendant admits the making of the bill as declared upon; and, if it were unnecessary to look at the bill for other purposes, the objection would not arise. Here the indorsements are denied; and, though the handwriting

(a) Before Lord Denman C. J., Patteson, Williams, and Coleridge J.

(b) 8th edit.

(c) *Chitty on Bills*, 212. S. C. M. & M. 116.

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on the back of the paper may be proved and read without the explanation, yet, as soon as it is sought to ascertain what bill they refer to, and for that purpose to read the bill, the alteration becomes an obstacle; for, without explanation, the bill is unstamped, and cannot be looked at for any purpose. The defendant admits that *Smith* made a bill on the 10th *December*, but says, I did not indorse that bill, nor did the other parties mentioned in the record. To prove this the bill must be read, though admitted for another purpose. If it had no stamp it could not be used; and the alteration, not explained, has, in effect, the same consequence.

Cur. adv. vult.

Lord DENMAN C. J., on a subsequent day of the term (*November 15th*), delivered the judgment of the Court.

As these pleadings stand, we think that the plaintiff was not bound to explain the alteration before the indorsement was read. The making of the bill, as set out in the declaration, was admitted on the record: the only issues were on the indorsements. It therefore did not lie on the party who produced the bill for the mere purpose of proving the indorsements to account for the alteration.

Rule refused.

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DOE on the Demise of PLEVIN and Another, *Monday,*
 against BROWN and Another, Assignees of *November 6th.*
 JOHN PLATT.

ON the trial of this ejectment at the last *Chester* assizes, before *Alderson B.*, a verdict was found for the defendants, but leave given to move to enter a verdict for the plaintiff; and now

Evans moved accordingly (a). (The facts and the grounds of motion are fully stated in the judgment of the Court.)

Cur. adv. vult.

On a subsequent day of the term (*November 25th*), Lord DENMAN C. J. delivered judgment as follows. This was an application to enter a verdict for the lessors of the plaintiff, under the following circumstances. The defendants defended as landlords of *Joseph Platt*, the tenant in possession. *John Platt* had demised to him in 1830. Subsequently he had become embarrassed; and, in *July 1836*, assigned the premises and all his personal estate to the lessors of the plaintiff. He went with them at the time to the dwelling house, informed *Joseph* that he had so assigned, and requested

him. The assignees under *A.*'s commission defended as landlords, and contended that the assignment to *C.* was invalid, *A.* having become bankrupt when he made it.

Held, that the acknowledgments above mentioned did not estop *B.*, or the assignees as representing him, from contesting *C.*'s title on the above ground; such acknowledgments having been made in consequence of *A.*'s representations, in which he suppressed the facts rendering the assignment invalid.

(a) Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

him

A. demised a house and lands to *B.*, and afterwards, being embarrassed, assigned the premises, and all his personal estate, to *C.* *A.* told *B.* that he had assigned the premises, and requested him to give *C.* an acknowledgment, whereupon *B.* gave *C.* a shilling, and subsequently agreed with *C.* to give up possession to him of the house and lands respectively at the usual times, receiving an allowance for his improvements. Afterwards, and while the premises were still in *B.*'s occupation, *A.* became bankrupt, and *C.* brought ejectment.

1837. him to give them an acknowledgment. Accordingly he gave them 1s. In *September* 1836, the lessors of the plaintiff proposed to raise the rent, and *Joseph* signed the following memorandum : —

DOX dem.
PLEVIN
against
BROWN.

“ I agree with *William Newall* and *James Plevin* to deliver up the peaceable possession of the *Holywell Farm* at the usual times of giving up the lands, and also to quit the house and premises at the usual times of giving up, to the above *William Newall* and *James Plevin*. As witness my hand this 19th day of *September* 1836: making *Mr. Joseph Platt* allowance for such improvements as may be considered by two impartial persons of right.”

Signed “ *Joseph Platt*.”

Subsequently a fiat in bankruptcy issued against *John Platt*, under which he was declared a bankrupt; and the defendants are his assignees. The contention in the cause was between the assignees under the assignment of *July* 1836, and those under the fiat, who disputed the validity of that transaction. It was insisted, however, on the part of the former, that in this action that question was not open, and that the defendants coming in to defend as the landlords of *Joseph* were in no better condition than he; and that he, after the payment of the 1s. and the signing the memorandum, was estopped from disputing the title of the lessors of the plaintiff.

Supposing this question to be open, no dissatisfaction is expressed with the summing up or the finding of the jury; and the only point for us to consider is, whether the learned Judge should have allowed the inquiry to be instituted.

We

We are very clearly of opinion that he was right in so doing. No general rule, when rightly understood, is more important or more strictly to be observed than that which precludes the tenant from disputing the title of his landlord; and we may concede that, in the present case, the defendants stood in the same situation as *Joseph Platt*, and could avail themselves of no defence which was not open to him. But he had not received his possession first from the lessors of the plaintiff, nor was any attempt made to question that title under which he had received possession. Assuming that the 1s. was paid by way of acknowledgment, which we are informed by the learned Judge was very questionable, still it was paid in the first instance upon the request and under the representations made by *John Platt*, and the memorandum signed only as a consequence of that payment, and upon the faith of the same representations. If, at the very time when *John Platt* informed *Joseph* of the assignment to the lessors of the plaintiff, he had committed an act of bankruptcy, and that assignment which he represented as valid was in truth void, he was practising a fraud on *Joseph*; and no case has decided that it would not be open to *Joseph* to explain under what circumstances he made any attornment or other acknowledgment. *Gregory v. Doidge* (a) is a strong and direct authority to the contrary. There was both the fact of 1s. paid as an acknowledgment of *Doidge's* title, and an agreement with him, after a statement of the amount of rent, to depasture some of his cattle in part payment of the rent. But this was done on the representation of *Doidge's* brother, and in ig-

1837.

DOX dem.
PLEVIN
against
BROWN.

(a) 3 Bing. 474.

1837.

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BROWN.

norance of a defect in his title; and the Court of Common Pleas was clearly of opinion that, under these circumstances, the plaintiff, not having come into possession under *Doidge*, might shew that he was not his landlord. Had even *John Platt* been the lessor of the plaintiff, it would have been open for *Joseph* to have shewn a cesser of his title before the day of demise; for that would have been consistent with the accepting possession from him. Upon the broad principle, however, that it is always open to a party, not guilty of laches, to explain and render inconclusive acts done under mistake or through misrepresentation, we think this inquiry properly gone into: and consequently there will be no rule.

Rule refused.

1837.

RAWSON *against* EICKE.Tuesday,
November 7th.

DEBT for use and occupation of a messuage, &c. Contract (dated April 28th) as follows: — *A.* agrees to execute to *B.* a lease of all that messuage, &c., habendum to *B.*, his executors, &c., for seven years, from 24th June next, at the yearly rent of 105*l.*, payable half yearly; the lease to contain covenants to pay rent and to repair, with proviso for re-entry on non-performance of covenants: *B.* agrees to accept such lease and execute a counterpart, and *B.* further agrees, when the dwelling-houses on each side of the messuage hereby agreed to be demised shall be tenanted, to pay an additional yearly rent of 15*l.* during the residue of the seven years; *A.* agrees, on or before June 24th, to erect eight pannels, &c. (several works to be done by *A.* were then specified, as to paper certain rooms, fix a range and stoves, hang bells, lay on water, &c.): and it is agreed that, by the said lease hereby agreed to be granted, the rent reserved shall be 120*l.*, and that, by a separate deed, to bear date the day after such lease, *A.* shall release to *B.* the annual sum of 15*l.* out of such rent of 120*l.*; *B.* to prepare the lease at his own cost, to be approved of by *A.*'s solicitor. *A.* to have the option of making the lease fourteen years.

“An agreement, made the 28th day of April 1835, between Benjamin Homan, of St. Leonard's-on-the-Sea, in the county of Sussex, builder, of the one part, and Charles Eicke, of the same place, gentleman, of the other part. The said *B. H.* agrees to make and execute unto the said *C. E.* a good and valid lease of all that messuage or tenement and dwelling-house situate on the Marina, St. Leonard's aforesaid, and numbered 67, together with all cellars, watercourses, easements, and appurtenances thereto belonging; to hold to the said *C. E.*, his executors and assigns, for the term of seven years, from the 24th day of June next, at and under the yearly rent of 105*l.*, clear of all taxes and assessments except the land tax, payable half-yearly; the first half-yearly payment to be made on the 25th day of

June 24th, to erect eight pannels, &c. (several works to be done by *A.* were then specified, as to paper certain rooms, fix a range and stoves, hang bells, lay on water, &c.): and it is agreed that, by the said lease hereby agreed to be granted, the rent reserved shall be 120*l.*, and that, by a separate deed, to bear date the day after such lease, *A.* shall release to *B.* the annual sum of 15*l.* out of such rent of 120*l.*; *B.* to prepare the lease at his own cost, to be approved of by *A.*'s solicitor. *A.* to have the option of making the lease fourteen years.

B. entered and paid rent to *A.*, as first mentioned. No lease was executed.

Held, that the contract was not a lease, but an agreement merely.

And, *A.* having, after execution of the contract, mortgaged the premises and become bankrupt, of which the mortgagee gave *B.* notice,

Held, that the mortgagee might bring an action of use and occupation against *B.* for the rent accruing in the half year during which the notice was given.

1837.

RAWSON
against
EICKEL

December next: and it is hereby agreed that the said lease shall contain a covenant on the part of the said *C. E.* to pay the said rent; also to keep the said premises in repair, damages by fire excepted: also a proviso for re-entry on non-payment of the said rent by the space of twenty-one days after the same shall become due, or on non-performance of any of the covenants on the lessee's part to be performed: and the said *C. E.* agrees to accept of such lease as aforesaid, upon the terms and conditions above specified, and to execute a counterpart thereof: and the said *C. E.* further agrees, when and so soon as the messuages or dwelling-houses on either side of the said messuage hereby agreed to be demised shall become tenanted and occupied, to pay to the said *B. H.* an additional yearly rent of 15*l.* during the remainder which shall be thenceforth then to come of the said term of seven years: and the said *B. H.* agrees, on or before the 24th day of *June* next, to erect eight light pannels in front of the drawing-room windows," and blinds, &c., to the same; to paper the hall and staircase, and certain rooms; to fix a range, &c., in the kitchen, and stoves in certain rooms; to fix and hang the bells and knocker on the front entrance-door; to complete the pantry windows, and lay on the water; and to paint the chimney-pieces, &c.

"And it is hereby agreed that, by the said lease hereby agreed to be granted, the rent therein reserved shall be 120*l.*; and that, by a separate deed, to bear date the day next after the said indenture of lease, the said *B. H.* shall release to the said *C. E.*, out of the said annual rent of 120*l.*, the annual sum of 15*l.*

Witness our hands.—The said *C. E.* to prepare
lease

lease at his own costs, to be approved of by the lessor's solicitor.

“ Signed, “ *Charles Eicke.*
 “ *Benjamin Homan.*”

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against
EICKE.

“ N.B. — It is agreed that Mr. *Homan* may have the option of making the lease 14 years.

“ Signed, “ *Charles Eicke.*
 “ *Benjamin Homan.*”

This writing had a 1*l.* agreement stamp. The defendant entered, and paid rent to *Homan*. In *July*, 1835, *Homan* mortgaged his interest in the premises to *Rawson*, the plaintiff. In 1836, *Homan* became bankrupt; and the plaintiff thereupon gave the defendant a notice, dated *September 27th*, 1836, informing him of the mortgage, and that it had now become absolutely vested, and requiring him to pay the plaintiff all rent then due, or thereafter to become due, in respect of the premises. The rent being afterwards demanded on the plaintiff's behalf, the defendant refused payment because he had not got his lease, but, being told that the plaintiff would execute it if he, defendant, would have it prepared, he said he would do so in the course of a week. This action was brought to recover such rent for half a year, ending at *Christmas*, 1836. The defendant's counsel objected that the instrument produced was a lease, and was therefore not properly stamped; and that, if it was a mere agreement, *Homan's* interest in it was not assignable to the plaintiff. The learned Judge held that the document was not a lease; but gave leave to move for a nonsuit. The plaintiff had a verdict for 52*l.* 10*s.* In this term (*a*)

(*a*) *November 6th*. Before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

Platt

1837.

RAWSON
against
BRICKELL.

Platt moved according to the leave reserved. The writing produced was a lease, not an agreement. (He then read the material parts.) The parties evidently contemplated that this should be the actual instrument of letting till a lease was granted. Several of the matters stipulated for would not be comprehended in the future lease. The additional rent of 15*l.* would depend on this document only. If it was a mere agreement, the rent contracted for was a chose in action, and not assignable.

The Court took time to speak to *Littledale J.*

Cur. adv. vult.

LORD DENMAN C. J. now delivered judgment as follows: — We are of opinion that the document in this case was properly received; for that it was an agreement, and therefore rightly stamped. Nor does any objection arise on the alternative that was suggested: the mortgagee had the legal estate, and was the person entitled, under the circumstances, to claim the rent.

Rule refused.

Wednesday,
November 8th.

BRICKELL *against* HULSE, Bart.

If a party, on motion before a judge, use the affidavit of another person, such affidavit is, on any subsequent occasion, admissible as evidence against him who so used it. Even on a trial when the person who swore the affidavit is present in Court and is not called.

TROVER for horses, goods, chattels, &c. The defendant paid 20*l.* into Court, and pleaded that the plaintiff had sustained no further damages, which the plaintiff traversed. Issue thereon. On the trial before

Tindal

Tindal C. J., at the last *Hampshire* assizes, it appeared that the goods in question had been seized under a writ of execution against the plaintiff, the defendant being sheriff. Other writs of execution had also issued against the plaintiff. The conversion relied upon consisted of certain acts done by one *James White*. To connect *White* with the defendant, the plaintiff proved that, in *June* 1836, after *Trinity* term, the defendant applied to a Judge at chambers to extend the time for returning the writs, in order that an application might be made in term time under the Interpleader Act, 1 & 2 *W.* 4. c. 58.; that the time was extended accordingly; and that on the application at chambers the defendant had put in an affidavit of *James White*, now produced, and from which it appeared that *White* had seized the goods as officer to the defendant, and had been in possession of them. *White* was in Court at the time of the trial. The evidence was objected to, but received. Verdict for the plaintiff.

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 BRICKELL
 against
 HULSE.

Erle now moved for a new trial (a). The depositions of a party who may be produced cannot be given in evidence. The fact, that the defendant had himself used the affidavit on a former occasion, does not take the case out of this rule; it has been decided that depositions used by a party in an equity suit cannot afterwards be produced against him on a trial, if the person making them might be called; *Rushworth v. Countess of Pembroke* (b), 2 *Phil. Ev.* 577 (c). There was no proof, independent of the affidavit, that *White* was the defendant's agent: the affidavit cannot therefore be received

(a) He also moved for a nonsuit, on a point not material here.

(b) *Hardres*, 472.

(c) 8th ed.

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HULSE.

as the declaration of an agent. [Lord Denman C. J. In the class of cases mentioned in the note to 1 *Stark. Ev.* 264 (a) the party sought to put in depositions which he had himself made use of.] The defendant ought to have had an opportunity of cross-examining *White*. [Coleridge J. He might have called *White*.] Not without releasing him. The depositions could be evidence only if the witness could not be produced, and if the suit was between the parties to the former proceeding; *Fry v. Wood* (b), *Benson v. Olive* (c), *Lutterell v. Reynell* (d). Here the plaintiff cannot be called a party to what took place on the application being made to the Judge at chambers. The Court will not lay down, as a general rule, that every affidavit which a party uses becomes, as against him, an admission on all future occasions.

Lord DENMAN C. J. It is very important that this question should not be left subject to doubt. There can, I think, be no question but that a statement which a party produces on his own behalf, whether on oath or not, becomes evidence against him. There is nothing to distinguish it from a statement made by the party himself. *Rushworth v. The Countess of Pembroke* (e) at first seems opposed to this view; for there the defendant was not permitted to use any of the depositions made in an Equity suit, where the plaintiff had been defendant. That decision, however, was founded on the nature of the proceedings in Equity. A party who uses such depositions does not know, beforehand, what they are: if he did, such cases would stand on the same footing as

(a) 2d ed.

(b) 1 *Atk.* 445.(c) 2 *Str.* 920.(d) 1 *Mod.* 284.(e) *Hard.* 472.

the

the present. He can only refer to what he expects will be produced: it is like the case of a witness called at Nisi Prius, whose evidence does not bind the party calling him. It is quite different from a case where a party produces, as part of his own statement, an affidavit of which he knows the contents.

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PATTESON J. The statement in the affidavit was used by this defendant for the purpose of staying proceedings. Supposing the party swearing it had been in fact an officer who merely used the defendant's name, the defendant is identified with him as far as this question is concerned. When a party, for any purpose, produces a document containing certain statements, such statements are, as against him, evidence of the facts which they contain.

WILLIAMS J. Suppose this had been the statement of the sheriff himself: then it would clearly be evidence against him. It would be unimportant whether or not the measure which he wished to adopt would avail him: the question would only be, What was the statement of facts on which he claimed relief? That such a statement is made on oath cannot affect the case.

COLERIDGE J. This is a very clear case when we attend to the facts. On one side, the defendant makes an application to a Judge, and arms himself with a statement, which he makes his own, and uses. That is clearly evidence against him afterwards of the facts in the statement. The statement may be of more or less avail: and it may be matter of remark that the person making the affidavit is present and is not called. But
that

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that is not the question here. As to the depositions in Equity, they stand on the same footing with *vivâ voce* evidence given in a court of law. A man does not make all that is said by a witness whom he calls evidence against himself hereafter. In Chancery, the depositions are sealed up from the time of their being taken until publication passes. That is like the case of a party calling a witness, whose evidence he does not hear till it is given. The present is the case of a party using a statement which he has seen before he uses it, and which is neither the more nor the less admissible for being made upon oath.

Rule refused.

Wednesday,
November 8th

The QUEEN *against* The Churchwardens of
BRANCASTER.

Mandamus to churchwardens, to raise a rate to pay principal and interest of money borrowed on the credit of parish and church rates, under the church building acts, 58 G. 3. c. 45., and 59 G. 3. c. 134.

Return, that, since the security was given, the lender, who was the prosecutor, had become bankrupt.

Plea, that the prosecutor had lent the money as trustee for a party named, out of monies vested in him as trustee, and in which he had no interest except as trustee.

On demurrer, assigning for cause, that the nature of the trust did not appear: Held good.

MANDAMUS to the churchwardens of the parish of *Brancaster* in *Norfolk*. The inducement stated that, after stat. 58 G. 3. c. 45. (a), and also after stat. 59 G. 3. c. 134. (b), to wit on or about 9th *May* 1832, the then churchwardens of the said parish, with the consent of the vestry and of the bishop of the diocese, and of the then incumbent, did borrow from *George Morse* and *Robert John Turner*, upon the credit

(a) For building and promoting the building of additional churches in populous parishes.

(b) To amend and render more effectual an act passed &c. (stat. 58 G. 3. c. 45.).

of

of the church rates, a sum, viz., 146*l.*, which was then necessary for &c., under the last-mentioned statute, and the further sum of 54*l.*, which was necessary for &c., under the first-mentioned statute, and that, by a deed poll, dated 9th *March*, 1832, the then churchwardens charged the parish and church rates with the repayment of the said sum of 200*l.*, and interest (stating the times of payment): that the said sum and interest were wholly unpaid, and the time for payment elapsed; and that *Morse* and *Turner* had applied to the churchwardens to raise by rate a sum sufficient to pay them; yet the churchwardens had refused, though the rates already made were not sufficient. The writ then commanded the churchwardens, without delay, to make and raise one or more rate or rates, to pay &c., according to the statutes and the agreement, or shew cause &c.

Return. First, a denial of the borrowing; Secondly, that, since 9th *May*, 1832, to wit, 16th *May*, 1834, “a fiat in bankruptcy was duly issued against the said *R. J. Turner*, under which he has been duly found and declared a bankrupt, and which fiat is still subsisting and in full force and effect.”

The prosecutors traversed the denial in the first part of the return, concluding to the country; and, as to the residue of the return, they answered that the said sums of 146*l.* and 54*l.* “were lent and advanced by the said *G. Morse* and *R. J. Turner* as trustees for other persons; that is to say, for” &c. (naming the parties), “to the then churchwardens of the said parish,” “out of monies belonging to and vested in the said *G. Morse* and *R. J. Turner* as trustees of and for such other persons as aforesaid: and that the said *R. J. Turner* was and is interested in the said monies only as such trustee.”

Verification.

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 against
 The
 Churchwardens
 of BRANCASTER.

The defendants joined issue on the traverse : and, as to the residue, demurred, assigning for cause, that the prosecutors had not stated any deed or instrument under which the monies were vested in them as trustees, nor had shewn with certainty that they were so vested, or in what manner such trust was created : and that, if the churchwardens traversed the allegation, it would be a traverse of matter of law. Joinder.

Kelly for the defendants. The prosecutors should have set out the nature of the trusts, so as to enable the defendants to take issue, if proper. Unless every species of trust would furnish an answer, the return is not met, since the answer must be construed most strongly against the prosecutors, on whom it lay to meet the case set up by the return. Now a banker is, properly speaking, a trustee for all who keep cash with him : yet, if he become bankrupt, the money deposited will become the property of his assignees. So property in the hands of a trustee might, in some cases, be in his reputed ownership with the consent of the true owner. [*Patteson J.* How can a debt be mixed up with the other property of a bankrupt?] He might have held the money originally as banker, and have lent it out for his customer, taking a security to himself. Then the debt and the security would pass to his assignees. [*Patteson J.* If I direct my banker to invest money of mine for me, and he does invest it, there is no difficulty in distinguishing the sum invested from his property.] The objection is, that it is not shewn how the trust really does stand : an issue on the fact of the prosecutors being trustees would be clearly bad. It will be objected, that the return does not state any assignment under the
 bankruptcy

bankruptcy (a) : but the Court will presume that the fiat has been regularly followed up : and, if not, they will not direct the money to be paid over, since, when the assignment does take place, it will relate back to the bankruptcy.

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of BRANCASTER.

Peacock, contrà, was stopped by the Court.

LORD DENMAN C. J. It is clear that the fact of the prosecutors being trustees is quite sufficiently set out.

PATTESON, WILLIAMS, and COLERIDGE Js., concurred.

Judgment for the Crown (b).

(a) See *Phillips v. Hopwood*, 1 B. & Ad. 619.

(b) See *Lloyd v. Wood*, 5 A. & E. 228.

The QUEEN against GEORGE WATTS.

Wednesday,
November 8th.

ON appeal against the account of *George Watts*, assistant overseer of the poor of the parish of *Slimbridge*, in the county of *Gloucester*, entitled, "An account of the disbursements of *George Watts*, assistant overseer from April 6th 1834 to April 6th 1835," and containing, among other things, the following items : —

	£	s.	d.
Paid six months pay for maintenance of the			
poor, as per contract, 29l.	-	-	174 0 0

Appeal lies against the accounts of an assistant overseer, unless there be any limitation, in the warrant of appointment, which prevents his being accountable to the parish.

And where, in a case stated on appeal against such

accounts, the sessions find that the assistant executed all the duties of an overseer, this Court will intend that the warrant was before the justices in sessions, and was not limited as above mentioned.

The appeal against an overseer's account, under stat. 17 G. 2. c. 38. s. 4., must be made to the next practicable sessions after the account is published; that is, after it has been deposited with the churchwardens and overseers for public inspection, and the fact of depositing bonâ fide made known.

Paid

1837. Paid six months pay for maintenance of the
 poor, as per contract, 39*l.* - - 234 0 0

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 against
 Watts.

The Court ordered the said items to be struck out of the account, subject to the opinion of this Court upon the following case.

The said *George Watts* was assistant overseer of the poor for the parish of *Slimbridge*, from the 6th of *April*, 1834 to the 6th of *April*, 1835, and executed all the duties of an overseer of the poor. On the 2d of *April*, 1835, at a vestry-meeting duly held, the said account of the said *George Watts* was examined and allowed by *James Cornock* and *John French*, churchwardens, *George Greening*, overseer, *William Ludlow*, *James Smith*, and *John Bailey*; and on the next day, being *Friday* the 3d of the same month, the account was submitted to two justices of the peace for the county, at a special sessions holden at *Wotton-under-Edge*, for that purpose, and was by such justices signed and allowed. *George Watts* did not, however, deliver over his said account until the 8th of *May* following, when he delivered it in vestry to the churchwardens and the person who had been appointed assistant overseer to succeed him. An affidavit of the appellant (who was a rated inhabitant of the said parish), sworn in Court, was put in; and, after objection by the counsel for the respondents to its admissibility, was received by the Court. By this affidavit it appeared that the appellant had no actual knowledge of the account until the 23d of *April*, 1835. The *Easter* sessions for the county, if they had been held according to the ordinary course, would have commenced on *Tuesday* the 7th of *April*; but, in consequence of the assizes, they were held on *Tuesday* the 14th of *April*, by an order made pursuant to stat. 4 &

5 W. 4.

5 W. 4. c. 47. By the rules of the quarter sessions for the said county, notice of trial of an appeal must be given on or before the *Tuesday* in the week preceding the sessions; and, consequently, the last day for giving such notice for the said *Easter* sessions was *Tuesday* the 7th of *April*. No notice of appeal against the account was given for, nor was any appeal entered at, the said *Easter* sessions: but notice was duly given for the *Trinity* sessions holden in the month of *June* following. The questions for the opinion of the Court were: — First, Whether, upon the evidence, the appeal was brought in due time? Secondly, Whether an appeal lies against the account of an assistant overseer? The case was now argued (a).

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against
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W. J. Alexander and *Greaves*, in support of the order of sessions. First, an appeal lies, as in the case of an ordinary overseer. It may be said that the warrant should have been set out, to shew what the duties of this party were: but, as the sessions have found that he “executed all the duties of an overseer of the poor,” it must be presumed that the warrant was before them. In *Bennett v. Edwards* (b) this Court would not assume, without seeing the warrant, that it was part of the assistant overseer’s duty to produce the poor-rate to an inhabitant (the plaintiff): but, the jury on a second trial having found for the plaintiff, and the declaration averring that the defendant, *as assistant overseer, had the rate in his possession*, the Court intended, after such verdict, that the jury had ascertained by legitimate means

(a) Before Lord Denman C. J., *Patteson*, *Williams*, and *Coleridge* Js.

(b) 7 B. & C. 586.

what

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against
WATTS.

what his duty was (a); and the latter decision is recognised in *Batcheldor v. Hodges* (b). Here the officer has himself delivered the account, headed "An account of the disbursements of *George Watts*, assistant overseer," has passed that account, and has appeared as respondent on this appeal. Unless the appeal lies, there is no remedy if the account contains illegal charges. Stat. 17 G. 2. c. 38. s. 4., which gives an appeal against accounts delivered by parish officers, uses the term "such account," referring to sect. 1 of the same act; and it may be argued that that section speaks only of accounts to be rendered by "the churchwardens and overseers" to the "succeeding overseers," and consequently does not apply to the accounts of assistant overseers, whose office is constituted by a later statute, 59 G. 3. c. 12. s. 7. But the provisions of the act relate to the persons exercising the particular functions, under whatever denomination. So it was held in *Rex v. Great Faringdon* (c) that, under sect. 1 of stat. 17 G. 2. c. 38., a rated parishioner might claim to inspect the accounts of guardians appointed under stat. 22. G. 3. c. 83.

Then, as to the time of appealing. The appeal, by stat. 17 G. 2. c. 38. s. 4., must be made to the "next general or quarter sessions;" but that means the next practicable sessions; *Rex v. The Justices of Dorsetshire* (d), *Rex v. Thackwell* (e). The question here is, What were the first sessions at which it was practicable to appeal? If the time is to be reckoned from the allowance of the

(a) *Bennett v. Edwards*, 8 B. & C. 702. Affirmed on error, *Edwards v. Bennett*, 6 Bing. 230.

(b) 4 A. & E. 592.

(d) 15 East, 200.

(c) 9 B. & C. 541.

(e) 4 B. & C. 62.

account

account in special sessions, there was not sufficient time before *April* 7th, the proper day for holding the quarter sessions. It is true that the quarter sessions were postponed in this case, under the authority given by stat. 4 & 5 *W. 4. c. 47.*: but it may not have been within the appellant's knowledge that such a postponement would take place; and the mere circumstance of time having been suffered to elapse, within which notice of appeal might have been given, is not of itself sufficient to bar the appeal, as appears from *Rex v. Thackwell (a)*. There eight days, the time for notice of appeal at the *Monmouthshire* sessions (as appears from *Rex v. The Justices of Monmouthshire (b)*), had elapsed between the allowance of the account and the session immediately following; and yet an appeal to the session after that was held to be in time. But it also appears from *Rex v. Thackwell (a)* that the next practicable sessions are to be dated, not from the allowance of the account, but from the time when the officers deliver it over to their successors. That delivery is analogous to publication in the case of a rate; and, until it is perfected, the parishioners are not bound to look at the account. The object of stat. 17 *G. 2. c. 38. s. 1.* was, that the rate-payers might examine the accounts; before they are finally delivered over that cannot be properly done. The delay here being the respondent's fault, the case falls within the observations of Lord *Ellenborough*, in *Rex v. The Justices of Southampton (c)*. Further, it was sworn in this case that the appellant had in fact no knowledge of the account till *April* 23d. The affidavit supplies that which was wanting to the appel-

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against
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(a) 4 *B. & C. 62.* (b) 3 *Dowl. P. C. 306.* (c) 6 *M. & S. 395.*

1897. *The Queen against Watts*.
 lant's case in *Rex v. The Justices of Pembrokeshire* (a).
 [The argument on this admissibility of this affidavit is
 not further noticed, no judgment having been given
 upon it by the Court].

Talbot, contra. The right of appeal is strictissimi juris, created by statute, and not to be enlarged by construction; *Rex v. The Justices of Surrey* (b), *Rex v. Hanson* (c). It may perhaps have been proved that keeping these accounts was a part of the assistant overseer's duty; but an appeal does not lie against such accounts as those of an assistant overseer, that office being created by a statute later than stat. 17 G. 2. c. 38. The assistant overseer keeps the accounts as servant of the principal overseer, upon whom, therefore, any mismanagement ought to be visited. In *Cannell v. Curtis* (d), where the assistant overseer had headed his book "Overseers' accounts," *Tindal* C. J. was inclined to think that, if the overseers as well as the assistant had acted, the heading was still correct, "for where a deputy acts, the accounts he furnishes are properly speaking the accounts of his principal." In chusing overseers, under stat. 43 Eliz. c. 2. s. 1., regard is had to their substance; the parish does not look to the means of the assistant overseer. If he orders goods, the principal overseer is looked to. It would follow, from the argument on the other side, that an assistant overseer might be committed, under stat. 17 G. 2. c. 38. s. 2., or 50 G. 3. c. 49. s. 1., if the accounts were not rendered; but it has never been so held. The risk of an appeal is not allowed for in the

(a) 2 East, 213. And see *Rex v. Heath*, 5 A. & E. 343.

(b) 2 T. R. 504.

(c) 4 B. & Ald. 519.

(d) 2 New Ca. 228.

salary

salary of an assistant overseer. If he misconducts himself, the remedy against him is on the bond which he gives, under stat. 59 G. 3. c. 12. s. 7., to be put in suit if necessary by the overseers, under the direction of the vestry. As to any hardship that may be alleged if the overseers are held liable to render accounts where they are ignorant of the transactions, *Rex v. The Justices of Norfolk* (a) shews that ignorance is not an excuse. *Bennett v. Edwards* (b) turned on stat. 17 G. 2. c. 3. s. 3., and that clause contains words (commented upon in *Whitchurch v. Chapman* (c)) which are not found in stat. 17 G. 2. c. 38. s. 1. The assistant overseer, in this case, submitted his accounts to his own employers, the churchwardens and overseers, at the vestry; the Court will not hold him liable to an appeal if he has, in addition, done that which he was not obliged to do, by attending before the justices in petty sessions.

Further, this appeal is too late. It should have been made to the next quarter sessions after allowance of the account; *Rex v. The Justices of Worcestershire* (d). The allowance, not the delivery, is the act from which the time runs. In *Rex v. The Justices of Colchester* (e) it was held that an appeal lay, although the accounts had not been examined and allowed in special sessions according to stat. 50 G. 3. c. 49. s. 1.: it cannot, therefore, be necessary that the subsequent act of delivering over should have been gone through before an appeal is brought. Although the accounts should not have been delivered, a copy can be ob-

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(a) 4 B. & Ad. 238.

(b) 8 B. & C. 702. S. C. in error, *Edwards v. Bennett*, 6 Bing. 230.

(c) 3 B. & Ad. 691.

(d) 5 M. & S. 457.

(e) 5 B. & Ald. 535.

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tained, under stat. 17 G. 2. c. 38. s. 1. The appeal is given by that statute, sect. 4, not only against the account, but against any thing done or omitted by the justices; that provision evidently relates to the allowance, and cannot depend on the delivery. Secondly, as to the length of time. It is true that in *Rex v. Thackwell* (a) a period of ten clear days, from the allowance of the accounts to the first day of the sessions, was held insufficient; but that was on account of the length of time required by the sessions' practice for notice of trying an appeal. And in *Rex v. The Justices of Herefordshire* (b), where there were only two clear days for appealing at the next sessions, it was held that the appeal ought not to have been deferred. [Patteson J. That was the case of an appeal against an order of removal. And have not there been different decisions in such cases since?] A longer time was held insufficient in *Rex v. The Justices of Essex* (c), *Rex v. The Justices of Kent* (d), *Rex v. The Justices of Devon* (e), and *Rex v. The Justices of Southampton* (g); but, in each of the last three cases, the time required by the sessions' practice for notice of trying an appeal was a material circumstance. [He then contended that the affidavit was not admissible.]

Cur. adv. vult.

Lord DENMAN C. J., in this term (November 25th), delivered the judgment of the Court.

Our opinion is asked by the sessions on three points.
 1. Whether appeal lies against the account of an as-

(a) 4 B. & C. 62.

(b) 3 T. R. 504.

(c) 1 B. & Ald. 210.

(d) 8 B. & C. 639.

(e) 8 B. & C. 640, note (a).

(g) 8 B. & C. 641, note (a). S. C. 6 M. & S. 394.

sistant overseer? 2. Whether the notice of appeal was given in due time? 3. Whether the appellant's affidavit was properly received by the sessions to prove at what time he became acquainted with the allowance of the account by two justices of the peace?

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On the first point, we see no reason to doubt that an assistant overseer's account may be the subject of an appeal. He is not the servant of the churchwardens and overseers of the parish, but of the vestry, from whom he directly receives his authority; an authority which may indeed be limited by the warrant of appointment, but which does not appear to have been limited in the present case.

The second point may admit of some difference of opinion, but seems capable of being decided on principles of reason and convenience. Some cases have held that the time of allowance by the justices of the peace is that from which the time for giving notice must be calculated; *Rex v. Coode (a)*, *Rex v. The Justices of Worcestershire (b)*. The language of some others may be thought to import that every parishioner's right to appeal is kept alive as long as he is personally ignorant of the fact of such allowance. A strict adherence to either of these rules might obviously produce injustice; nor do we think that the cases, when fairly considered with reference to their circumstances, lay down either the one or the other: on the contrary, the Court must, on those occasions, have had the words of the statute 17 G. 2. c. 38. in their contemplation, which give the right of appeal to the party grieved, "giving

(a) 1 Bott, 307. pl. 290. 6th ed. S. C. Cald. 464. See *Rex v. Micklefield*, 1 Bott, 310, pl. 291. S. C. Cald. 507.

(b) 5 M. & S. 457.

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reasonable notice," to the *next* general or quarter sessions of the peace.

The sessions have therefore to adjudge what notice is reasonable, which must depend on their usual practice. Still the word *next* applied to the sessions requires an interpretation. Next to what period? Not to the period of examination by the vestry before allowance, because the justices of the peace, upon their investigation and before allowance, may have struck out every item to which parishioners feel an objection: not to the allowance itself, because it may be unknown to all the parties interested: nor to the fact of knowledge by any one disposed to appeal, because that would lead to an inconvenient enquiry into the particular knowledge of individuals, and might keep the officer's account subject to appeal indefinitely. The only other period, to which recourse can be had for this purpose, is that when the parish had the opportunity of knowing the contents of the account. Thus in *Rex v. Thackwell* (a) the time for giving notice was held to be properly reckoned from the time when the account was allowed and published. We think it may be correctly described as published at the time when it is deposited (according to the first section of 17 G. 2. c. 38.) with the churchwardens and overseers for public inspection, and the fact of depositing *bonâ fide* made known.

In the present instance, the sessions have found that this was done on the 8th of *May*. Therefore the *June* sessions, when the appeal was lodged, were the next sessions; and the notice was in due time. This makes it immaterial to enquire whether the appellant's affidavit

(a) 4 B. & C. 62. S. C. 6 D. & R. 61.

of the time when he knew of the account was properly admitted, because the enquiry was completely immaterial. The Court was consequently justified in entering on the merits of the appeal; and, having disallowed certain items, the rule for setting aside their judgment must be discharged.

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Order of sessions confirmed.

The QUEEN *against* The Inhabitants of CHURCH
KNOWLE.

Wednesday,
November 8th.

ON appeal against an order of justices removing *Robert Galley* from the parish of *Church Knowle*, *Dorsetshire*, to the parish of *St. Martin*, in the city of *Salisbury*, the sessions quashed the order, subject to the opinion of this Court upon the following case.

A former order of removal had been made upon the examination of the pauper, on *December 20th*, 1834, touching his hiring and service with one *James Turber* in or about the year 1824; but it did not state as a fact

A special case sent to this Court from sessions, on appeal against an order of removal, stated that notice of appeal was sent to the respondents, signed by four churchwardens and four overseers, therein described as the churchwardens and overseers

of *M.*; that afterwards a notice of the grounds of appeal was given, signed by two churchwardens and two overseers only, therein described as the churchwardens and overseers of *M.*; and that, on the hearing of the appeal, the sessions over-ruled an objection, made by the respondents, that the appellants were bound by the description first given of the parish officers, and could not therefore put in a notice signed by two churchwardens and two overseers. Held, that the appellants were not so bound, and that, from the above statement, this Court might infer that the appellants gave evidence at the sessions, explaining the difference between the notices, and shewing that the latter was signed by the proper officers.

On appeal against an order of removal grounded on a settlement by hiring and service, the respondents, discovering that the examination served by them on the appellants did not state a residence in the appellant parish, moved, at the sessions, to discharge their own order, and it was quashed, generally, with the consent of the appellants, no reason, however, being stated either to the appellants or to the justices. The respondents afterwards removed the pauper again to the same parish, no change of circumstances having intervened; and, on appeal, contended that the discharge of the former order was not conclusive, the merits not having been in question. Held, that the order was conclusive.

Per *Coleridge J.* Where an order is quashed merely because respondents decline going into their case, that is a decision on the merits.

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that, during such service, the pauper resided in the appellant parish. A copy of the order, together with the examination of the pauper, was sent by the churchwardens and overseers of the parish of *Church Knowle* to the churchwardens and overseers of the parish of *St. Martin*. Against this order an appeal was entered by *St. Martin's* parish, at the *Epiphany* sessions for the county of *Dorset*, 1835, and respited to the *Easter* sessions following. At the *Easter* sessions, the parish of *Church Knowle* having discovered that in the pauper's examination no mention was made of his having resided in *St. Martin*, moved, on this ground only, but without stating this or any other ground to the Court or the appellant parish, to quash their own order, which was done generally, and with the consent of the appellant parish.

The pauper having again become chargeable to *Church Knowle*, a second order of removal to *St. Martin* was made on another examination of the pauper, dated 27th *June* 1835, touching the same hiring and service with *Turber*, and also upon an examination of *Turber* touching the same hiring and service; and copies thereof were sent to the churchwardens and overseers of *St. Martin*. On 17th *August* the appellant parish sent to the churchwardens and overseers of *Church Knowle* a notice of appeal, signed by four churchwardens and four overseers, therein described as the churchwardens and overseers of the poor of the parish of *St. Martin* in the city of *New Sarum*; and on 5th *October* a statement of the grounds of appeal, signed by two churchwardens and two overseers only, therein described as the churchwardens and overseers of the poor of the parish of *St. Martin*, in the city of *Salisbury*; and the appeal was entered

tered at the *Michaelmas* sessions. The grounds of appeal against the second order were the same in the second statement as in the first, with the addition of a distinct ground of appeal as follows.

“ And because a former order of the same justices, for removing the said pauper from *Church Knowle* to *St. Martin* aforesaid, had been quashed by the court of quarter sessions for the county of *Dorset*, at the *April* sessions in the present year, and which said order of the said court related directly to the point then and now in question between the parties to the present appeal, and it is therefore binding and conclusive between them so far as respects the place of the last legal settlement of the said *Robert Galley*.”

At the hearing of the appeal, the court overruled an objection, made by the respondents, that the appellants were bound by the description, contained in the notice of appeal, of the four churchwardens and four overseers who signed the same, and that they were thereby precluded from putting in the statement of the grounds of appeal signed by two churchwardens and two overseers only. The same court overruled an objection, made by the appellants, to the reception of parol evidence to explain the grounds on which the respondents had moved to have the first order quashed, and, after hearing the same, thought the quashing of the said order conclusive as between the same parties, and accordingly quashed the last order.

If this Court should think that the statement of the grounds of appeal against the last order was improperly admitted, the order of sessions was to be quashed, and the last order of removal confirmed. Or if the Court should think that the justices were not warranted in
treating

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treating the first order quashed, under the circumstances, as conclusive, then the order of sessions was to be quashed.

Barstow and *Lucena* in support of the order of sessions. The respondents infer, from the notice of appeal being signed by four churchwardens and four overseers, that the notice of grounds of appeal ought likewise to have been signed by all or a majority of eight such officers. Stat. 4 & 5 W. 4. c. 76. s. 81. requires that, where notice of appeal against an order of removal shall be given, "the overseers or guardians of the parish appealing against such order, or any three or more of such guardians, shall, with such notice, or fourteen days at least before the first day of the sessions at which such appeal is intended to be tried, send or deliver to the overseers of the respondent parish a statement in writing under their hands of the grounds of such appeal." It might reasonably be contended that those words are sufficiently met if the notice of grounds of appeal are signed by two overseers where there are four. But there are not in fact four overseers in this parish. The local act, 11 G. 4. and 1 W. 4. c. lxxvi., which is a public one (a), and continues the provisions of stat. 10 G. 3. c. 81., uniting the three parishes in *Salisbury* for the purpose of relieving the poor, recognizes (by sect. 1) two overseers only, and two churchwardens, for *St. Martin's* parish, each of the other

(a) "For better assessing and recovering the rates for the relief of the poor within the city of *New Sarum*, and enlarging the powers of an act passed" (10 G. 3. c. 81.), "intituled, An act for consolidating the rates to be made for the relief of the poor of the respective parishes of *St. Thomas*, *St. Edmund*, and *St. Martin*, in the city of *New Sarum*."

parishes

parishes having, according to the same act, two overseers and four churchwardens. So far as the parishes are united, it is merely for the particular purpose contemplated by the act, namely, of assessing rates: but the officers are distinct, and no change is introduced as to the practice of removals between those parishes and places out of the city. Here, then, both notices have been signed by all the proper officers for *St. Martin*; if the first has been signed unnecessarily by persons assuming to be overseers, that is mere surplusage. As to the second point. Evidence was received at the sessions, on the authority of *Rex v. Wick St. Lawrence (a)*, to shew the grounds on which the respondents allowed the former order to be quashed. *Denman C. J.* lays it down there that, if the quashing of an order of removal be offered as evidence to prove that the pauper was not settled in the appellant parish, it may be shewn by parol evidence that the judgment proceeded upon some other ground. But it cannot be contended (as the respondents here must assert) that, whenever an order of removal has been quashed without a full decision on the merits, that order, on a subsequent litigation of the same settlement between the same parties, shall be deemed not conclusive. If that were so, parties might procure their own orders to be quashed for the purpose of reviving the dispute at a more convenient time; and this might be done again and again. An order quashed generally on appeal is conclusive between the parishes; but not if shewn to have been quashed on a point beside the merits; *Rex v. Bradenham (b)*, *Rex v. Wick St. Lawrence (a)*. Here the first order was

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(a) 5 B. & Ad. 526.

(b) Burr. S. C. 394.

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not quashed for any defect of form. The respondents allowed it to be discharged, supposing that the pauper's examination would not support their case; but that supposition was erroneous, for the respondents might have supplied by evidence a mere defect in the examination, *Rex v. Kelvedon* (a), though they could not have set up a case inconsistent with it, *Rex v. Mister-ton* (b). In *Rex v. Wick St. Lawrence* (c) the respondents, on the second appeal, proved that, since the former order of removal, which had been quashed, a new state of things had arisen; here nothing had changed since the first order of removal. The respondents, therefore, having procured that order to be quashed, in their own wrong and not on a point beside the merits, are precluded from litigating the settlement again. If not, the appellants who have been in no fault will be under a great hardship. [Coleridge J. You might have applied for your costs when the first order was discharged.]

Bond and Stock, contra. First, the notice of appeal purporting to be signed by four overseers and four churchwardens of *St. Martin's* parish, there are *primâ facie* four of each. Stat. 11 G. 4. and 1 W. 4. c. lxxvi., which deals with these parishes for a limited fiscal purpose, cannot afford any proof as to the number of officers who should interfere in cases of removal. If the appellant parish had only two overseers and two churchwardens, that fact should have been proved. [Coleridge J. Why must a notice of this kind have the signature of the churchwardens?] By the interpretation clause,

(a) 5 A. & E. 687. S. C. 1 N. & P. 138.

(b) 6 A. & E. 878.

(c) 5 B. & Ad. 526.

s. 109, of stat. 4 & 5 W. 4. c. 76., they are expressly included under the term "overseer (a)." [Coleridge J. It would seem, by sect. 21, that all powers relating to the management of the poor were meant to remain with the same persons as before, subject to the authority of the commissioners.] The local act here did not make the two overseers of *St. Martin*, who have signed the notice of grounds of appeal, the proper officers for such a purpose. And four signed the notice of appeal. As to the second point. The former order was conclusive only as to the matter which it decided. It was discharged on a mere informality; and the respondents were at liberty to shew that in support of the present order; *Rex v. Wheelock (b)*. The case is not materially different from that in which a first order has been quashed because the pauper was not then removeable, as in *Rex v. Wick St. Lawrence (c)*. The merits not having been decided upon, it was unnecessary that there should have been any change of circumstances before the second order was made. In *Rex v. St. Andrew, Holborn (d)*, none appeared. The question, what shall be considered a want of form, is answered in *Rex v. Cottingham (e)*, where the order had been quashed "for informality," and Lord Denman C. J. said, "Interpreting the meaning of the magistrates according to popular language, and in the usual sense of the words, we must understand that they meant to state that the order was not quashed on the merits." *Rex v. Penge (g)* also shews what kind of defects may be ranked under the term "informality." In *Rex v. Wick St. Lawrence (c)* Denman C. J. said, "When an order of removal has been discharged, not on the merits, but

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(a) See the next three cases.

(b) 5 B. & C. 511.

(c) 5 B. & Ad. 526.

(d) 6 T. R. 613.

(e) 2 A. & E. 250.

(g) Nolan's Rep. 176.

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on other grounds, it would be great injustice if it could be set up as a decision on the merits, by a party who knew that they had not been enquired into." The appellants here must have known the ground of quashing the first order, although here, as in *Rex v. Wick St. Lawrence* (a), that ground was not stated at the sessions. There had, indeed, in the latter case, been a communication to the appellants' attorney; but that circumstance alone cannot raise any substantial distinction.

LORD DENMAN C. J. I am of opinion that the sessions were right on both points. First, I think they were justified in overruling the objection that the appellants were bound by the description of the parish officers in the notice of appeal. It is clear that they were not so bound: and I think it follows from their holding themselves not bound, and from the objection being taken and overruled, that they must have given an explanation, before the justices, of the difference between the notice of appeal and notice of grounds. No statement appears on the case, which can warrant us in saying that the persons who signed the second notice were not in fact or in law a majority (b) of the officers. Secondly, the quashing of the first order was conclusive. It does not interfere with any former decision to say that the respondents here cannot take advantage of the motive in them which led to the quashing of that order; because, in the former cases, either it has been stated, in the order of sessions, that the Court quashed the order of justices for a reason assigned (which is different from the motive of a party), or the quashing has taken place

(a) 5 B. & Ad. 526.

(b) See *Rex v. The Justices of Warwickshire*, 6 A. & E. 873.

after

after communication between the parties, and by consent. Here the sessions did not state that they quashed the order for want of form; they quashed it generally. Then what a door would be opened to injustice if, in such a case, respondents might come a second time to the sessions, because, on a former occasion, they had left something which they call a defect of form in their examinations, and had thereupon suffered the order to be quashed. If that might be done here, it might be done after the lapse of twenty years; and the Court would have to enquire, at that distance of time, whether the former order had not been quashed because the respondents had chosen to fancy something wrong which really was not so. Here no person could have been misled by the examination: the pauper's residence in the parish was not stated, but no one could doubt that that was the point to be tried. I think the respondents ought to have been bound by their proceeding on the first appeal, unless they had secured the appellants from being misled, by acquainting them precisely with the ground on which they withdrew the order.

PATTESON and WILLIAMS Js. concurred.

COLERIDGE J. I should not add anything, but that, for a long time, I had a different opinion from that which I entertain now. Quashing an order for want of form is different from quashing it merely because the merits are not gone into. If the order is discharged because the respondents do not choose to enter into their case, that is a quashing on the merits. We decide this case, therefore, on the general ground which has been long established.

Order of sessions confirmed.

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1838.

The following cases, decided in *Michaelmas* vacation, 1838, may conveniently be added here.

The QUEEN *against* The Justices of
CAMBRIDGESHIRE.

The QUEEN *against* The Justices of
SHROPSHIRE.

The QUEEN *against* The Justices of
GLOUCESTERSHIRE.

A notice of application for an order of maintenance on the putative father of a bastard, under stat. 4 & 5 W. 4. c. 76. s. 73., must be signed by a majority of the aggregate body of churchwardens and overseers; therefore such a notice, signed only by two overseers of a parish, which has also two churchwardens, is bad.

Where such parish forms part of a union, *quære*, what officers should make such application and sign such notice?

Per Lord Denman C. J. The requisite number of officers must actually sign such notice.

IN the first of these cases a rule nisi had been obtained for a mandamus to the justices of *Cambridgeshire* to receive and hear the application of the inhabitants of *Willingham, Cambridgeshire*, for an order upon *Joshua Elwood*, under stat. 4 & 5 W. 4. c. 76. s. 72. The parish of *Willingham* had applied at the *October* quarter sessions, 1836, for an order to be made on *Elwood*, pursuant to the above clause, to reimburse the said parish for the maintenance and support of a bastard child, of which he was charged to be the father. The notice of application served on *Elwood* was signed by *John Smith* and *George Read*, who therein stated themselves to be (and who were) the overseers of the poor of the said parish. The parish had also two churchwardens, acting as such, who had not signed the notice; and on this ground it was objected at the sessions, by *Elwood's* counsel, that

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the notice was insufficient. The Justices held accordingly, and dismissed the application. In *Michaelmas* term, 1837 (a),

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Gunning shewed cause. Under stat. 4 & 5 W. 4. c. 76. s. 73., the churchwardens as well as the overseers ought to sign the notice. By sect. 72, when a bastard child shall become chargeable to any parish, as there mentioned, "the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate, may, if they think proper, after diligent inquiry as to the father of such child, apply to the next general quarter sessions" &c., for an order on the putative father for its maintenance. By sect. 73, "no such application shall be heard at such sessions unless fourteen days' notice shall have been given under the hands of such overseers or guardians to the person intended to be charged with being the father of such child of such intended application:" and, if the order is refused, the costs of the person intended to be charged are to be "paid by such overseers or guardians." And by the interpretation clause, sect. 109, "the word 'overseer' shall be construed to mean and include overseers of the poor, churchwardens, so far as they are authorised or required by law to act in the management or relief of the poor, or in the collection or distribution of the poor-rate, assistant overseer, or any other subordinate officer, whether paid or unpaid, in any parish or union, who shall be employed therein in carrying this act or the laws for the relief of the poor into execution." Under sect. 72 a discretion is to be exercised, and, by sect. 73,

(a) November 13th. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

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a risk of costs is incurred; the proceeding, therefore, ought not to be undertaken without the concurrence of all, or at least a majority, of the officers authorised by the act. Stat. 43 *Eliz. c. 2. s. 1.* makes the churchwardens, as well as the four, three, or two substantial householders, to be nominated as there mentioned, overseers of the poor; and stat. 13 & 14 *Car. 2. c. 12. s. 19.* makes it lawful for the "churchwardens and overseers," in the cases of bastardy there mentioned, to seize the goods of the putative father. The forms of proceedings under this statute and stats. 18 *Eliz. c. 3.*, and 49 *G. 3. c. 68.*, in *Burn's Justice (a)*, mention the churchwardens and overseers as the officers complaining. *Rex v. The Justices of Warwickshire (b)*, and *Rex v. The Justices of Derbyshire (c)*, where it was held that a majority of the officers (churchwardens and overseers) must join in giving notice of the grounds of appeal, are cases bearing upon this, though decided on a different section of the statute. Here, as in those cases, both the churchwardens and overseers are empowered to act, and a majority of the whole number of officers is requisite to bind, according to the rule laid down in *Rex v. Beeston (d)*, and sanctioned by *Grindley v. Barker (e)*.

Archbold, contra. There is no doubt that, if the churchwardens are proper officers to sign these notices, a majority of the churchwardens and overseers should sign them. But this is not a duty of the churchwardens under the enactments in question. The interpretation

(a) 1 *D'Oyly & Williams's Burn*, 357, 399. 1 *Chitty's Burn*, 365, 395, 26th ed. 1331.

(b) 6 *A. & E.* 873.

(d) 3 *T. R.* 592.

(c) 6 *A. & E.* 885.

(e) 1 *B. & P.* 229.

clause

clause, s. 109, makes them overseers only "so far as they are authorised or required by law to act in the management or relief of the poor, or in the collection or distribution of the poor-rate." Giving notice of applications in bastardy does not fall within either description of duties: it is an act for the indemnification of the parish, which has already relieved the child when the application is made. [Lord Denman C. J. How do you get over the provision of stat. 43 *Eliz. c. 2. s. 1.*, as to the persons who shall be overseers? *Williams J.* You must say that s. 109 of the present act supersedes that clause of the statute of *Elizabeth.*] That statute relates strictly to the relief of the poor, and does not extend to proceedings in bastardy. It makes the churchwardens *ex officio* overseers; but the question still is, whether they are such overseers as the statute 4 & 5 *W. 4. c. 76.* looks to for the present purpose; and the interpretation clause shews that they are not. By sect. 73, the overseers "or guardians" are to give the notice. If this extends to *ex officio* overseers, it may also be said to comprehend all the county justices, where they are made *ex officio* guardians by sects. 38 and 39. If the application for an order of maintenance fails, the officers are required peremptorily, by sect. 73, to pay costs. The overseers have a fund out of which to pay them; the churchwardens have none. *Rex v. The Justices of Warwickshire (a)* turned upon sect. 81 of the statute, which is differently worded from sect. 73, directing that "the overseers or guardians of the parish," "or any three or more of such guardians," shall send a statement &c.; and the notice there was in a matter connected with the "management or

[1898.]

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(a) 6 A. & E. 873.

[1898.] relief of the poor," and the "collection or distribution of the poor-rate."

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The Court, being informed that the two following cases would raise the same point, deferred giving judgment until those should have been argued.

Cur. adv. vult.

**The QUEEN
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In *The Queen* against *The Justices of Shropshire*, an application to the same effect as in the preceding case was made at the *Shrewsbury* quarter sessions, *April* 1897. The notice of application was signed by two persons styling themselves the overseers of the poor of *Clee St. Margaret*; and it appeared that they were the overseers of that parish, but that there were also two churchwardens; and these had not signed. An objection was thereupon taken to the notice, and the sessions, after argument, refused to proceed with the application. A rule nisi was obtained for a mandamus to the justices, as in the preceding case. In *Trinity* term 1898 (*a*),

Humfrey shewed cause, and *Whateley* supported the rule, on the grounds respectively which were urged in *The Queen v. The Justices of Cambridgeshire*. It was also observed, in support of the rule, that no inference could be drawn from the mention of "churchwardens" in stat. 13 & 14 *Car. 2. c. 12. s. 19.*, for that the old bastardy laws were variously worded in this respect; stat. 6 *G. 2. c. 31. s. 1.* and stat. 49 *G. 3. c. 68. s. 2.* requiring the overseers to proceed against the putative

(*a*) June 11th. Before Lord Denman C. J., Little Dale, Patteson, and Williams J.

father,

father, and not mentioning the churchwardens. To which it was answered that, in those statutes, the churchwardens were properly considered as included (by virtue of stat. 43 *Eliz. c. 2. s. 1.*) under the term "overseers." [Patteson J. referred to *Rex v. The Justices of the North Riding (a).*]

[1838.]

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Cur. adv. vult.

In *The Queen against The Justices of Gloucestershire*, an application had been made at sessions, and a rule nisi obtained in this Court, for the same purposes respectively as in the two preceding cases. The notice was signed by three persons, two styling themselves, and being, the overseers, and one the guardian, of the poor of the parish of *Whitminster*. The parish was part of an union formed under stat. 4 & 5 *W. 4. c. 76*. It was stated on affidavit, in opposition to the rule, that, before the parish was incorporated in such union, the affairs of the poor were administered by two churchwardens and two overseers, and not by any guardian: that, upon the incorporation, it elected its poor-law guardian according to the above statute, and he had always acted as one of the guardians at the board of guardians of the union, the proceedings of which board were conducted according to the statute, and to the rules of the poor-law commissioners. The guardian who signed the present notice was elected as above mentioned. One of the rules was that (except in some instances not material here) no guardian should have power to act in virtue of such office unless as a member, and at a meeting, of the board. By another rule, the powers given to the guar-

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(a) 6 *A. & E.* 863.

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dians were to be exercised by the majority of the guardians who should attend at a meeting as therein directed; but no act, except adjourning, was to be valid, unless three attended and concurred. The present notice was not signed at a meeting of the guardians, nor on one of their board days. At the sessions, *June 1837*, it was objected by counsel that the notice was insufficient, because not signed by the churchwardens; and the justices, on this ground, refused to hear the application (a). In *Michaelmas* term, 1838 (b),

Cripps and *W. J. Alexander* shewed cause. First, by sect. 72 of the statute, if the parish be part of an union, the application at sessions must be made by the guardians; and, by sect. 73, the notice must be given by the same parties. Sect. 72 mentions "the overseers or guardians of such parish, or the guardians of any union in which such parish may be situate;" but the mention of "overseers or guardians" there refers only to the officers of parishes not yet incorporated in unions. Sects. 38, 54, 95, shew that, where a board of guardians is established under the statute, the overseers (except in some particular cases) have no power to act for the relief of the poor, otherwise than as servants to the guardians. The notice, therefore, in this case,

(a) It was also objected at the sessions, and before this Court, that the service of notice was insufficient, it having been served on the wife of the putative father at his dwelling-house in his absence. An affidavit in support of this rule alleged a belief that he had absented himself to avoid service; but it was stated, on the other side, that no evidence of this had been offered at the sessions. No decision was given on the sufficiency of the service.

(b) *November 12th and 15th.* Before Lord Denman C. J., *Patteson, Williams, and Coleridge* Js.

ought

ought to have been given by three guardians (sect. 38) assembled at a board. The point has been differently decided at different sessions ; but, if the overseers of an incorporated parish could make the application, there might be a double notice in each case ; for it cannot be contended that the guardians also might not apply. Supposing, however, that the guardians were not exclusively the proper persons to take this proceeding, the notice here, being signed by the overseers only, is bad. It should have been subscribed by a majority of the aggregate body of churchwardens and overseers. The signature of the one guardian cannot aid it. [*The Attorney-General*, contra, said that he should make no point of the guardian's signature.] Stat. 43 *Eliz. c. 2. s. 1.* requires the churchwardens and overseers, "or the greater part of them," to act. Stat. 13 & 14 *Car. 2. c. 12. s. 19.* does not speak of the greater part ; but, in practice, it has always been assumed that a majority should concur. Stat. 8 & 9 *W. 3. c. 30. s. 1.* requires certificates of settlement to be signed by the churchwardens and overseers, or the major part of them. In *Rex v. Beeston* (a) the construction given to the words of stat. 9 *G. 1. c. 7. s. 4.*, enabling "the churchwardens and overseers of the poor" to contract, &c., was that a majority of the whole number were to do so. In *Rex v. The Justices of Lancashire* (b), where a single overseer had appealed against the constable's account, under stat. 18 *G. 3. c. 19. s. 5.*, which gives the appeal to the "overseer or overseers," it was held that "the collective body of the parish officers," acting by a majority, was meant. *Rex v. The Justices of Warwickshire* (c) and

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(a) 3 *T. R.* 592.(b) 5 *B. & Ald.* 755.(c) 6 *A. & E.* 873.

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Rex v. The Justices of Derbyshire (a) shew that notices under stat. 4 & 5 W. 4. c. 76. s. 81. must be given by a majority of the parish officers. And it may be inferred from the decision in *Rex v. The Justices of the North Riding* (b), that, if the district making the application in that case had had churchwardens instead of chapelwardens, a notice signed only by the two overseers would have been insufficient.

Sir J. Campbell, Attorney-General, contra. As to the first point, it would be hard if the overseers could not make an application, the object of which is to take off a parochial burden, not a burden upon the union. Under the present act, overseers of parishes retain their powers in matters which are properly parochial; and sect. 72 expressly enacts that, where a bastard is chargeable to any parish as there mentioned, the application for an order of maintenance shall be made by the overseers or guardians of such parish, or the guardians of any union in which it may be situate. Perhaps either may be competent to make the application; in that case it is properly made by the party applying first. Then, as to the signature; it may be admitted that, where several persons are authorised to do an act in the capacity of trustees for others, a majority of such trustees must concur. But here the churchwardens are no part of the body so authorised. Sects. 72 and 73 do not mention them. Sect. 109 includes churchwardens under the term "overseers" for some purposes, but not for those of sects. 72 and 73, which expressly mention overseers, and omit churchwardens.

(a) 6 A. & E. 885.

(b) 6 A. & E. 863.

If churchwardens, by reason of the clause in sect. 109, must concur in applications of this kind, so also must a number of other officers, there mentioned, and among them assistant overseers; yet it has been held that an assistant overseer may not be entitled to join in such an application; *Rex v. The Justices of the North Riding (a)*. And further, even assuming that a majority of the churchwardens and overseers must concur, it does not follow that a majority must sign. The concurrence of a majority would be matter of evidence if the present application were entertained. In *Rex v. The Justices of Lancashire (b)* there was actual proof that a majority dissented. [Coleridge J. By sect. 79 the notice of application is to be "under the hands of such overseers or guardians."] It may be sufficient if one signs for others. [Lord Denman C.J. I cannot think so. The person served with notice should be enabled to see that the notice is really a good and valid one.]

Cur. adv. vult.

LORD DENMAN C.J., on *December* 1st, 1838 (at the sittings in Banc, held in *Michaelmas* vacation, under stat. 1 & 2 *Vict. c. 32.*), delivered the judgment of the Court.

In each of these cases application was made for a mandamus to enter continuances and hear an appeal in bastardy, the court of quarter sessions having refused to entertain it for the same objection to the notice given to the putative father; viz., that it was not signed by either churchwarden, but only by the two overseers appointed by the justices of the peace.

(a) 6 *A. & E.* 863.

(b) 5 *B. & Ald.* 755.

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The

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The QUEEN
against
The Justices of
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The QUEEN
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The seventy-third section of the Poor Law Amendment Act contains an express proviso that no such application shall be heard at the sessions unless "notice shall have been given under the hands of *such* overseers or guardians;" and the reference is to the preceding clause, which empowers *the overseers* or guardians of the parish likely to be burdened to apply to the sessions for relief.

It is admitted that, of those who are by law required to give the notice, the majority must appear to have concurred in it, by signing the notice itself; and the statute 43 *Eliz.* constitutes the churchwardens overseers. But the maintenance of bastard children is said not to be a matter connected with the relief of the poor; an assertion on the face of it untenable, as the inability of the mother to support her child, and the consequent necessity of calling on the parish to do so, are the very foundations of the proceeding.

A difficulty is raised from the interpretation clause, which enumerates all such persons as shall be *meant and included* in the term overseers, wherever it occurs in the act. Those persons are "overseers of the poor, churchwardens, so far as they are authorised or required by law to act in the management or relief of the poor, or in the collection or distribution of the poor-rate, assistant overseer," and all subordinate persons employed in the relief of the poor; and it is argued that the legislature could not intend the majority of this indefinite and fluctuating body to concur in giving the notice.

The argument goes rather to shew the inconvenience of requiring the majority to act than to determine whether a churchwarden is an overseer, the real question in

in these cases. But we apprehend that an interpretation clause is not to receive so rigid a construction; that it is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be comprehended within that term, where the circumstances require that they should. We cannot, however, refrain from expressing a serious doubt whether interpretation clauses of so extensive a range will not rather embarrass the Courts in their decision than afford that assistance which they contemplate. For the principles on which they are themselves to be interpreted may become matter of controversy; and the application of them to particular cases may give rise to endless doubts.

In the present instance, we are convinced that the 109th section did not mean to make it necessary for a notice under the seventy-third to be signed by others than are required by the seventy-second, which merely requires that a majority of the overseers, in the ordinary sense of the word, should concur in signing it. We mean, of course, the substantial householders, two, at least, in number, to be appointed by the justices of the peace, whom stat. 43 *Eliz. c. 2.* associates with the churchwardens, declaring all to be overseers of the poor.

A notice, therefore, signed by the former class alone, is bad: the sessions were justified in dismissing a proceeding founded on such notice; and these several rules for writs of mandamus must be discharged.

Rules discharged.

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Where a notice, under stat. 4 & 5 W. 4. c. 76. s. 81., states, as the ground of appeal against an order of removal, that the pauper was settled in a third parish, not adding, as a ground, that he had no settlement in the appellants parish, the respondents are not bound to prove a settlement there.

If, in proof of a settlement by renting a tenement, under stat. 6 G. 4. c. 57., a writing not under seal be produced, demising land, and also professing to demise incorporeal hereditaments, at an entire rent, evidence may be given to shew how much of such rent the land was worth. And, if the amount is 10l. a year, and the land has been occupied, and rent paid, according to the statute, the settlement is good.

The instrument above described reserved a rent of 75l. and had a stamp of 1l. 10s. Held sufficient: and that the writing did not require to be stamped as a lease not otherwise charged, under stat. 55 G. 3. c. 184. sched. part 1.

ON appeal against an order of two justices, whereby *Elizabeth Thorn* was removed from the parish of *Hockworthy*, in *Devonshire*, to the parish of *Chipstable*, in *Somersetshire*, the sessions quashed the order, subject to the opinion of this Court on a case, the material parts of which were as follows.

A notice of appeal, and of the grounds of appeal, had been duly served by the appellant parish. (The notice contained nothing material to the decision: the grounds of appeal were stated as follows.)

"That *John Thorn*, deceased (the late husband of the said *Elizabeth Thorn*), was legally settled in the parish of *Bampton*, in the said county of *Devon*, by renting, of one Mr. *Robert Elsworth*, certain lands and hereditaments, situate in the said parish of *Bampton*, for a year, from *Lady-day* 1830, at a rent of upwards of 10l. a year; and that he occupied the same for a year, and paid a year's rent for the same; and that the said *Elizabeth Thorn*, the widow of the said *John Thorn*, is therefore legally settled in the said parish of *Bampton*." (Signed by the churchwardens and overseers.)

When the above notice had been read, at the trial of this appeal, the respondents contended that, looking to the terms of it, they had received no notice to prove the

settlement

settlement in the appellant parish, and that the appellants were bound to prove the settlement in *Bampton*, to which alone the statement of their grounds of appeal was confined. The Court, however, called upon the respondents to support their order by proving the settlement (as stated in their examination) in the appellant parish. The respondents objected to the right of the appellants to cross-examine the witnesses on this part of the case, under the terms of their notice. The Court held that they were entitled to cross-examine; and they did so.

The respondents attempted to prove a settlement in the appellant parish by hiring and service, which, in the judgment of the Court, they failed to substantiate. The appellants then attempted to establish a settlement of the pauper through her late husband, by reason of his renting a tenement in *Bampton*, and tendered in evidence the following instrument, signed by the pauper's husband and one *Robert Elsworthy*.

"Memorandum of agreement, made the 24th day of *March* 1830, between *Robert Elsworthy* of" &c., "of the one part, and *John Thorn* of" &c., "of the other part, witnesseth: That the said *Robert Elsworthy* doth let unto the said *John Thorn* a dairy, consisting of ten cows, and ten living calves, to be all in pail by the 1st day *May*, or 3s. 6d. per week to be allowed for the deficiency of each or either of the said cows, after the 1st of *May*; and, if any or either of the said cows should (a), by loss of milk or misfortune, after seven days' notice has been given, to be exchanged for another, or satisfaction made for such loss: Also the kitchen, back kitchen, dairy, and two bedrooms (except as hereinafter

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excepted): Also sufficient linhays, pigsties, and other appurtenances, which have been usually let with the said dairy, together with the north part of the garden, and 120 perches properly manured and cultivated for potatoes, and twenty-five faggots of wood, to be delivered in the court for each cow, with liberty of cutting browse at the said *Robert Elsworthy's* appointment; to be found a horse one day in a week when barrelling of butter, and one day a fortnight when not barrelling; the pigs to run in the east part of the orchard until the apples are deemed necessary to be saved, and then in the *Gorney* until the apples are taken in, and to be kept well ringed to prevent their doing damage: And also to have certain plots of ground, called *Great South Moor, Cross Park, Gorney, Middle Castle, and West Castle*, and the first fortnight's keep in the *South Castle*; also the pasture of the *House Meadow*, after the hay is carried off, until the 1st day of *November 1830*:” (like provisions as to “the lower meadow” and another meadow:) “the said lower meadow to be unstocked when very wet; and to help to mow and make the hay in the said meadow, free of expense, except being found meat and drink; the hay to be put in one rick, and divided in three parts; two of the three parts to be for the use of the said cows; one of which two parts to remain unconsumed at *Lady-day 1831*: And to keep the windows properly glazed; and so to leave the same at the end of the term, except what glass the said *R. E.* or family breaks: In consideration of the said *John Thorn*, his executors, administrators, or assigns, paying unto the said *R. E.* the sum of 75*l.*; the first quarter's rent to be paid” &c. (fixing the days of payment quarterly): “Also the said *R. E.* reserves liberty of the fireplace in the

the kitchen," &c. (then followed some other stipulations not material). "The said *Robert Elsworthy* to find all firing for his use in the kitchen: the cows to be kept on straw before they have calved during the winter; also to have half of the poultry and eggs, and liberty of running one pig with the said *John Thorn's*, who is to keep fence for his own pigs, and to attend to all stock on the said farm in the absence of the said *R. E.*: the parting in the said orchard to be kept at a joint expense; the said *John Thorn* to work for one shilling and liquor, when required; and to quit at the end of the year without any further notice, unless otherwise agreed on. In witness" &c. (Signed by *Elsworthy* and *Thorn*).

The above instrument was stamped with a 1*l.* 10*s.* stamp: and the pauper's husband occupied under it the premises referred to therein for above a year, and paid to the amount of the 7*5l.* reserved by it.

The respondents objected, first, that the stamp was insufficient; and, secondly, that the instrument purported to be a demise of incorporeal hereditaments, and should therefore have been under seal.

The questions submitted to this Court were, first, whether, looking at the terms of the notice of appeal, the sessions were right in requiring the respondents to prove a settlement in the appellant parish, and whether the appellants were entitled to cross-examine the respondents' witnesses called for such purpose. If this Court should be of opinion that the sessions were right in that respect, the order of removal was to be quashed, otherwise, to be confirmed, unless this Court should be of opinion that the settlement in *Bampton* was proved in reference to the two following questions (and in that case the order of removal was to be quashed), viz.

whether

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whether the instrument before mentioned was properly stamped so as to be admissible in evidence ; and, whether a settlement was gained by occupying, under that instrument, the premises mentioned in it, and by paying the 75*l.* per annum reserved by it.

Bere, in support of the order of sessions. The first question is, whether, under stat. 4 & 5 *W. 4. c. 76. s. 81.*, the appellants were not at liberty to put the respondents to proof of the settlement in the appellant parish. The parties are reciprocally bound by their notices : the respondents have given notice, by transmitting the order and examination, that they undertake to prove a settlement in the appellant parish : the legislature cannot have intended that the appellants should be bound to inform the respondents that they will hold them to the proof which they have undertaken to give, and which has already been made part of the issue between them. [*Coleridge J.* Suppose no ground of appeal were stated, would that put the respondents to proof?] That would be the same question. [*Coleridge J.* Suppose the examination stated several different settlements in the appellant parish, must the respondents prove all?] The Court has, indeed, held that even objections apparent on the face of the order of removal cannot be insisted upon, unless specified in the statement of grounds (*a*), which, certainly, is a stronger case than this; and if the decision be adhered to, the first question must be decided against the respondents. [*Lord Denman C. J.* It is of very great consequence that we should adhere to the rule that appellants must give notice of what they intend to dis-

(a) See *Rex v. Wüthernwick*, 6 *A. & E.* 273.

pute

pute or prove; and, therefore, we shall hold that the appellants were precluded from disputing the settlement in the appellant parish.] The question then is as to the settlement in *Bampton*. It may be doubted whether the case shews enough, and whether it should not have been made appear, as in *Rex v. Pickering (a)*, how much rent issued out of the land, and how much from other subjects of demise. But it is a question here, whether all from which the rent issued was not properly land or a dwelling-house. [*Coleridge J.* Some of the land is demised for less than a year.] Then the case should be re-stated.

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The Court (stopping *T. H. Terrell*, *contrà*) directed a re-statement, and the following addition was made to the case after the words “75*l.* reserved by it,” p. 495. *antè*. “That (*b*) out of the 75*l.*, the value of *Great South Moor, Cross Park, Gorney, Middle Castle, and West Castle*, and garden, amounts to 13*l.* 2*s.* 6*d.* clear.” The case was again argued in *Hilary* term, *January* 17th, 1838.

Bere (with whom was *Praed*), in support of the order of sessions. A settlement was gained under stat. 6 *G. 4. c. 57. s. 2*. If an incorporeal hereditament and land also passed by the deed, the sessions might consider, on a question of settlement, what was the value of each, according to the principle of *Rex v. Pickering (a)*. But in fact no incorporeal hereditament passed. The agreement is, throughout, either a grant of goods and chattels, or a grant of land. The agreement for cutting browze was a contract for the sale of goods, like the bargain for

(a) 2 *B. & Ad.* 267.(b) *Sic.*

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timber in *Smith v. Sarman* (a). The demise of pasture is a demise of the land for the purpose of pasturing, and this may pass by livery of seisin, *Shepp. Touchst.* 97.; it is not, therefore, an incorporeal hereditament. In this a demise of pasture differs from a mere taking in of cattle to feed. At all events the rent may be considered, for the present purpose, as issuing wholly out of the land. *Gardiner v. Williamson* (b) may be cited on the other side, but is not in point. There a distress was made for rent arising partly from tithes, and partly from a messuage; and, there being no deed, and no distinct reservation in respect of the corporeal hereditament, the distress was held to be unlawful. The rent issued out of both in point of render; and there was no ascertained sum for which the remedy could be taken in respect of the corporeal hereditament. But in *Bird v. Higginson* (c) *Littledale J.* said, "Are there not cases where, a rent being nominally reserved out of two things, of which one was capable of having rent issuing out of it, and the other not, the rent has been held to issue wholly out of the former?" And in *Farewell v. Dickenson* (d) the declaration, in debt for rent, alleged a demise of a messuage; the demise proved was of a messuage and furniture; but, as the rent, in point of law, issued out of the realty, not the furniture, the demise was held to be well laid. The word "hiring," in stat. 6 G. 4. c. 57. s. 2., makes it questionable whether the legislature contemplated the holding at a rent in the strict legal sense; they probably had in view only a payment, of whatever nature, which might be a test of ability. The stamp here is sufficient, under stat. 55

(a) 9 B. & C. 561.

(c) 2 A. & E. 701.

(b) 2 B. & Ad. 336.

(d) 6 B. & C. 251.

G. 3. c. 184. sched. Part I., whether the document be considered a lease or an agreement. *Clayton v. Burtenshaw* (a) may be cited; but there the instrument was under seal, and was held to fall under the description of a “*deed* not otherwise charged.”

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T. H. Terrell, contra. If part of the matter demised here was an incorporeal hereditament, and therefore not grantable without deed, the demise was wholly void, and no settlement could be gained under it. In *Bird v. Higginson* (b) a demise, not under seal, of a messuage, with license to shoot and fish, was held void; and in *Gardiner v. Williamson* (c), where a messuage and tithes were let at an entire rent, a distress for such rent was held to be altogether unlawful. Then does the instrument now in question grant an incorporeal hereditament? In *Rex v. Hollington* (d) the pauper rented the ley of two cows in a certain pasture, but had not the exclusive pasture; and it was held that he gained a settlement, because his contract had been (as in former cases there cited) “for the pernaney of the profits of the land by the mouths of the cattle;” which was an incorporeal hereditament. In *Cb. Litt. 4 b.*, it is said that “*pastura*” contains “the ground itself called pasture;” but “*pascuum*, feeding, is wheresoever cattle are fed, of what nature soever the ground is, and cannot be demanded in a *præcipe* by that name;” and 14 *Vin. Abr.* 124., *Grants* (E. a.), pl. 2, 3., supports the same distinction. Here the pauper had the feeding only in the pastures, not the land itself; he took, therefore, a mere easement, which ought to

(a) 5 B. & C. 41.

(b) 2 A. & E. 696. S. C. affirmed, on error, 6 A. & E. 824.

(c) 2 B. & Ad. 336.

(d) 3 East, 113.

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have been granted by deed; *Hewlins v. Shippam* (a). [Williams J. What do you say to the cases where a dairy of cows, with feeding on certain lands, has been demised verbally? (b)] Those cases were under stat. 13 & 14 Car. 2. c. 12. s. 1, which spoke only of coming to settle; now, the demise is material. [Lord Denman C. J. Under the statute of *Charles*, the party must have come to settle on a "tenement."] The liberty of cutting browse here was a mere easement; a license to do what would otherwise have been waste. As to the stamp, *Coster v. Cowling* (c) is the case which comes nearest to the present. The demise here relates to the land and to other distinct subject-matters, which may be of great value. It appears to fall within the description in stat. 55 G. 3. c. 184., sched. Part I., of a "lease" "not otherwise charged."

LORD DENMAN C. J. It is not necessary to consider the terms of this contract with reference to the effect they have as between the parties. Here is land demised at 13*l.* a year to the pauper, and occupied, and the rent paid, by him. I cannot say in this case that the demise was void, whatever question might arise as to the recovery of the rent. The stamp is sufficient for a lease of lands at a yearly rent of less than 100*l.* There is no reason for saying that this was not a tenement within stat. 6 G. 4. c. 57,

LITLEDALE J. The holding is, at all events, good as far as regards the land. It is as if freehold and copyhold were demised together without license from the lord: the demise would be good for the freehold.

(a) 5 B. & C. 221.

(b) *Rex v. Tolpudde*, 4 T. R. 671.; *Rex v. Stoke-upon-Trent*, 10 East, 496.

(c) 7 Bing. 456.

WILLIAMS J. I am of the same opinion. The cases to which I adverted during the argument proceeded on the ground that there had been a demise of an interest in land.

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COLERIDGE J. The authority of *Rex v. Pickering* (a) is not disputed; but it is said that, as this instrument fails to pass the incorporeal hereditaments mentioned in it, it is void altogether. The only ground assigned for maintaining this is, that it was taken for granted in *Bird v. Higginson* (b) and *Gardiner v. Williamson* (c). I do not see that it was so; but, however that might be where, as in *Bird v. Higginson* (b), the Court was looking at the instrument as merely executory, and it might be said that part of the consideration failed, here the question is, whether the party has occupied a house or land hired by him, at the yearly rent required by the statute. The cases do not apply. I think, however, that there was here an attempt to pass an incorporeal hereditament. The cutting of browse was to be at the landlord's appointment; and he, not having demised his whole estate, might appoint the cutting elsewhere than on the land demised. *Smith v. Surman* (d) was a different case; there the demise was of the timber on particular land, at so much per foot. But, as there was, in the present case, land enough demised for the amount of rent required by the statute, and a distinct holding, the order of sessions was right.

Order of sessions confirmed.

(a) 2 B. & Ad. 267.

(b) 2 A. & E. 696. S. C. affirmed, on error, 6 A. & E. 824.

(c) 2 B. & Ad. 336.

(d) 9 B. & C. 561.

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By stat. 5 G. 4. c. 84. s. 21., in the case of convicts sentenced to transportation, or convicted of capital offences and pardoned on condition of being transported, the clerk of the court in which the offender is convicted is to be paid by the treasurer of the county, &c., "the same fee as hath been usually paid, and he is lawfully entitled to receive, for every order of transportation." Held,

A RULE nisi was obtained, in *Michaelmas* term 1833, for a mandamus to the defendant, as treasurer of the county of *Middlesex*, to pay to *John Clark*, gentleman, as clerk of the session of the delivery of the King's gaol of *Newgate*, 916*l.* 7*s.* 4*d.*, for convicts capitally convicted and pardoned on condition of transportation or imprisonment, convicts sentenced to be transported, and convicts sentenced to be imprisoned and kept to hard labour in the house of correction, instead of transportation, at the general session of the delivery of the King's gaol of *Newgate*, holden for the county of *Middlesex*, in the years 1831 and 1832. Upon the rule coming on for argument, the Court directed a special case. A case was stated accordingly, of which the substance is as follows.

The first statute relating to transportation was stat.

1. That the clerk of every such court is entitled to receive such fees as can be proved to have been usually in fact paid to the clerk of that particular court for such order.

2. That, where the fees had been paid, without variation as to amount, as long as could be recollected down to the time of a particular clerk, and to him for the first four years after he entered upon the office, but not for the residue of the term (forty-five years) during which he held it, this could not of itself so interrupt the course of usual payment, as to prevent a mandamus issuing to the treasurer to pay the fees to the successor of such clerk.

Although previous statutes had provided for the payment, by the treasurer to the clerk, of the same fee as had been usually paid, or the clerk was entitled to; and although, still earlier, and down to the latest receipt of the fees in the particular court, they had been paid, not by the treasurer, but by the contractors for transportation.

Punishment by hard labour was first introduced by stat. 5 *Ann.* c. 6.; since that time several statutes have provided for it, both by original sentence and by way of commutation. Some of these statutes, which expired in 1802, provided that the clerk of the court should give a certificate, for which he should receive the same fee as was usually paid on orders of transportation. Since 1802, the clerk of the court of gaol delivery of *Newgate* had continued to give the certificates, and, down to 1805, he had received the fees for them. Held, that he was not now entitled to receive any fees, the statutory enactment having expired, and no usage existing, inasmuch as the act of giving certificates had been originally performed under statute.

4 G. 1. c. 11. (a), (1717), which enacted that certain offenders, entitled to the benefit of clergy, might be sent to some of his Majesty's colonies and plantations in *America*, for the space of seven years; and that the Court before whom they were convicted should have power to convey, transfer, and make over such offenders, by order of Court, to the use of any person or persons who should contract for the performance of such transportation, to him or them, and his or their assigns, for such term of seven years; and that, where any persons had been or should be convicted of offences for which they were excluded the benefit of clergy, and should receive the royal mercy on condition of transportation, it should be lawful for any Court having proper authority to allow such offenders the benefit of a pardon under the great seal, and to order and direct the like transfer and conveyance to any person or persons who would contract &c. (as before).

Between the passing of stat. 4 G. 1. c. 11. and stat. 5 G. 4. c. 84. (which is the act now in force as to transportation), several other acts passed relative to transportation; amongst others, stats. 6 G. 1. c. 23., 16 G. 3. c. 43., 19 G. 3. c. 74., 24 G. 3. c. 56., 55 G. 3. c. 156., 56 G. 3. c. 27., and 1 & 2 G. 4. c. 6.

By stat. 6 G. 1. c. 23. s. 2. the Court before which conviction took place was authorised to empower two justices of the county to contract with persons for the transportation of felons, and to cause the felons to be delivered to the persons contracting; such contracts to be certified to the next Court. The material parts of statutes 16 G. 3. c. 43. and 19 G. 3. c. 74. are hereafter set out (b).

So much of stat. 19 G. 3. c. 74. as related to trans-

(a) Sect. 1.

(b) Post, p. 506—510.

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portation beyond the seas was, with certain amendments, continued (a) until and after the passing of stat. 55 G. 3. c. 156. By the last act, the laws relating to convicts subject to transportation, and capital convicts reprieved on condition of transportation, were amended, and were continued to the 1st of *May* 1816 (b); and by sect. 3 it was enacted, "That the clerk of assize, clerk of the peace, or other clerk of the court, shall be paid by the treasurer of the county," &c., "*the same fee as hath been usually paid, or such clerk of assize, clerk of the peace, or other clerk of the court is entitled to for the order of transportation of any offender.*"

By stat. 56 G. 3. c. 27. (which passed on 30th *April* 1816), certain other amendments were made in the laws relating to transportation, and which were to continue till the 1st of *May* 1821 (c). Sect. 4 contained an enactment precisely similar to that above cited in sect. 3 of stat. 55 G. 3. c. 156.

By stat. 1 & 2. G. 4. c. 6. (which passed on 24th *March* 1821), the powers and provisions of stat. 56 G. 3. c. 27. were continued down to, and the same were in force at the time of the passing of, stat. 5 G. 4. c. 84.

Sect. 1 of stat. 5 G. 4. c. 84. (which passed on 21st *June* 1824) recites that it is expedient that the laws relative to the transportation of offenders should be revised and consolidated into one act. By sect. 2 provision is made as to the transportation of convicts liable to be transported, and of capital convicts receiving mercy on condition of transportation. Sect. 21 enacts that "all such fees, on the delivery out of custody of any such

(a) See 54 G. 3. c. 30., and the statutes on this subject referred to in the margin of sect. 1.

(b) Sect. 19.

(c) Sect. 21.

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offender so ordered to be transported or removed, as have usually been paid to the sheriff or gaoler, and all reasonable expenses which the sheriff or gaoler shall incur in every such removal, shall be paid by the county," &c., "or place for which the court in which the offender was convicted shall have been held," by the treasurer of such county, &c.; "and the clerk of the court shall be paid by such treasurer *the same fee as hath been usually paid; and he is lawfully entitled to receive, for every order of transportation.*"

Before and down to *February* sessions, 1784, inclusive, the clerk of the session of gaol delivery of *Newgate* received, in respect of every capital convict reprieved on condition of transportation, and for every felon sentenced to transportation, a fee of 6s. 2d., which sum was regularly paid to him by the contractors for the transportation of the convicts: but there is no evidence to shew that, since that period, any fee in respect of such convicts has been paid to him (a).

The first statute relating to punishment by hard labour was stat. 5 *Ann.* c. 6. (1706). Sect. 2 of that statute enacted that, where any person should be convicted of larceny, and should have the benefit of that act allowed thereupon, or ought, by the laws in force before the making of stat. 10 & 11 *W. 3.* c. 23., to be burnt in the hand for such offence, he should be burnt in the hand as before the making of the said act: and the judge or justices, before whom such offender should be tried and convicted, should also, at his or their discretion, award and give judgment that such

(a) The case here qualified the above statement by a reference to some circumstances upon which nothing ultimately turned, the decision assuming the facts to be as stated in the text.

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offender and offenders should be committed to some house of correction or public workhouse within the county, &c., or place where such conviction should be, there to remain and be kept &c., for such time as such judge or justices should then judge and award, not less than &c.; and an entry thereof should be made of record pursuant to such judgment and award; and such offender and offenders should be there set at work and kept at hard labour for the time adjudged and recorded. That statute made no provision for any fee whatever to the clerk of the court or other officer.

Sect. 1 of stat. 16 G. 3. c. 43. (1776) enacted that, where any male person should be lawfully convicted of grand or petit larceny, or any other crime for which he should be liable by law to a sentence of transportation to *America*, it should be lawful for the Court before whom such person should be so convicted, &c., if such Court should think fit, in the place of such transportation, to order and adjudge that such person should be kept to hard labour in any work for the benefit of the navigation of the *Thames*, under the management and direction of an overseer or overseers, for the same term as the transportation for the said offence might by law have been adjudged, or such shorter term as such Court should think fit. Sect. 2 enacted that, where any male person should be lawfully convicted of any robbery, or other felony not clergyable, and receive the royal mercy on condition of being kept to hard labour in the custody of such overseer or overseers, it should be lawful for the judge, &c., to make an order for allowing forthwith to such offender the benefit of a conditional pardon; and such judge, &c., might and should adjudge that such offender should be kept to hard

hard labour, in the custody of such overseer or overseers, for the time specified in a notification to be made by one of the principal secretaries of state. Sect. 9 enacted that, when any offender should be ordered to be kept to hard labour as aforesaid, or as thereafter was directed, the clerk of assize, clerk of the peace, or other clerk of the court by which such order should be made, should give to the sheriff or gaoler, having the custody of such offender, a certificate in writing under his hand, containing an account of the christian name, surname, and age of such offender; of his offence, of the Court before whom he was convicted, and of the term for which he should be so ordered to hard labour; and the sheriff, or gaoler, having the custody of such offender, should, with all convenient speed after the making of any such order, and receiving of such certificate, convey such offender, or cause him to be conveyed, to such place within *England*, and also deliver such offender, or cause him to be delivered, together with the said certificate, to such overseer or overseers. Sect. 10 enacted that, when any person should be convicted of grand or petit larceny, or any other crime for which he or she should be liable to transportation, it should be lawful for the Court, if it should think fit, in the place of such punishment by transportation, to order and adjudge that such person should be sent to some proper place of confinement within the county, there to be kept to hard labour for such term or number of years as such Court should appoint, not exceeding &c. Sect. 11 enacted that, where any person should be convicted as in sect. 2, and receive the royal mercy on condition of being kept to hard labour at the place of confinement to be appointed for

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for that purpose, it should be lawful for the judge, &c., to make an order for allowing forthwith to such offender the benefit of a conditional pardon, and to adjudge that such offender should be kept to hard labour at the place of confinement after mentioned, for a time to be specified, &c. Sect. 12 directed that the clerk of assize, &c., should give to the sheriff or gaoler a certificate, with respect to the convicts ordered to hard labour under sects. 10 and 11, like that directed by sect. 3. to be given with respect to the convicts ordered to hard labour under sects. 1 and 2; and the sheriff or gaoler was directed forthwith to convey the offender to the proper house of correction. Sect. 17 enacted that such clerk of assize, &c., should be paid by the treasurer of the county, &c., the like satisfaction "*as hath been usually paid for the order of transportation of any offender.*"

This statute continued in force until 1st July 1779 (a).

Stat. 19 G. 3. c. 74. (1779) s. 1. enacted that any person convicted of any crime for which he should be liable to be transported to *America* might by the Court be ordered and adjudged to be transported to any parts beyond the seas, in such and the like manner and for any term of years not exceeding such and the same term as and for which such person was or should be liable to be transported to *America*. Sect. 24 enacted that, when the two penitentiary houses directed by the act to be built should be fitted and completed, then, where any person should be convicted of grand or petty larceny, or any other crime for which he or she should be liable to be transported, it should be lawful for the Court, in the place of such transportation, to order and adjudge that such person should be imprisoned and kept to

(a) Sect. 23.

hard

hard labour in one of such penitentiary houses. Sect. 26 enacted that, in the mean time, it should be lawful for the Court to order and adjudge such offenders to be imprisoned and kept to hard labour in the respective houses of correction, or other places, within each respective county. Sect. 27 enacted that, where any male person should be convicted of grand larceny, or any other crime (except petty larceny) for which he should be liable to be transported, it should be lawful for the Court, in the place of transportation, to order and adjudge that such person, if of competent age, &c., should be punished by being kept on board ships or vessels, and employed in hard labour, in a river or port, &c. Sect. 28 enacted that, where any person should be convicted of any robbery or other felony not clergyable, and receive the royal mercy on condition of being kept to hard labour during any specified term in any penitentiary house, or, such offenders being males, upon condition of being kept to hard labour during any specified term for the benefit of the navigations mentioned in the act, the Court might allow such offender the benefit of a conditional pardon, and order him to be kept to hard labour in such penitentiary house, or in the custody of such superintendant or superintendants, and for such time, as in the act was mentioned. Sect. 29 enacted that, when any offender should be ordered and adjudged to be kept to hard labour in any of the manners therein aforesaid, the clerk of assize, or other clerk of the court in which such offender should be convicted, should give to the sheriff or gaoler, having the custody of such offender, a certificate in writing, containing certain particulars; and the sheriff or gaoler should thereupon convey such offender to such house or place to which such

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such order should direct him to be conveyed, and there deliver him with the certificate. Sect. 30 enacted that the clerk of assize, or other clerk of the court, should have the same fee, gratuity, or satisfaction, on granting such certificate, "*as hath usually been paid, and would have been due to them respectively, if such offender had been sentenced to transportation*" (except in the case of petty larceny); and such fees, gratuities, and satisfaction should be paid by the treasurer of the county or place for which the court wherein such offender was convicted should have been held, to such clerk of assize, or other clerk of the court.

The power given by the last-mentioned statute (so far as it authorised the Courts to sentence to hard labour in the place of transportation, convicts liable to transportation, and convicts capitally convicted and reprieved on condition of being kept to hard labour) was continued by several statutes (a) to the 25th of March 1802, when it ceased. From that time the sentences to hard labour were under the said stat. 5 Ann. c. 6. and stat. 53 G. 3. c. 162. (b), until the passing of stat. 7 & 8 G. 4. c. 29. But, since 1802, certificates of the convictions of persons sentenced to hard labour, containing particulars similar to those required by stat. 16 G. 3. c. 43. ss. 3, 12. and stat. 19 G. 3. c. 74. s. 29., have been made by the clerk of the court, and transmitted to the house of correction with prisoners sentenced to hard labour there.

In 1778 (while stat. 16 G. 3. c. 43. was in force), *Benjamin Deacon*, being clerk of the session of the delivery of the King's gaol of *Newgate* for *Middlesex*, obtained a

(a) Stat. 28 G. 3. c. 24. Stat. 34 G. 3. c. 60. Stat. 39 G. 3. c. 52.

(b) That act makes no provision as to certificates or fees.

mandamus,

mandamus, on argument by counsel, commanding the treasurer of *Middlesex* to pay him such fees for the persons tried and convicted of felony and other offences, at the several sessions of the delivery of his Majesty's gaol of *Newgate*, holden for the county of *Middlesex*, at the *Old Bailey*, in 1776, 1777, and 1778, and ordered to be punished by hard labour in pursuance of stat. 16 G. 3. c. 43., as before the said act had been always paid by, and received of, the contractor for the transportation of the several persons convicted of felony at the several sessions of the delivery of the said gaol of *Newgate*, holden for the said county of *Middlesex*. The rule was obtained on Mr. *Deacon's* affidavit, that he had been clerk upwards of seven years, and that, from the time of his appointment, until the passing of stat. 16 G. 3. c. 43., he always received of the contractor for the transportation of the persons convicted of felony the fee of 6s. 2d. for every person ordered at such sessions to be transported; the affidavit also stated the number of persons ordered to be punished by hard labour during the time for which the fees were claimed.

The fees so claimed by Mr. *Deacon* were paid to him by the treasurer of *Middlesex*, in consequence of the mandamus; and the like fees continued to be paid by the treasurer to *Benjamin Deacon*, and *Thomas Shelton*, his successor in office (a), until about the beginning of 1805. Upon the death of Mr. *Shelton*, in 1829, *John Clark* was appointed clerk of the session of gaol delivery of *Newgate*. About the beginning of 1831,

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(a) It was not expressly stated in the case at what time Mr. *Shelton* succeeded to his office: but it was assumed, on both sides, that he succeeded about 1780.

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Mr. *Clark* rendered to the justices of the peace for *Middlesex* an account of fees claimed by him.

The case then stated particulars respecting the demand of the sum claimed by the rule, and a refusal by the magistrates of *Middlesex* and the treasurer (*a*). It also shewed the number of orders for transportation or hard labour in respect of which the fees were claimed.

The question for the opinion of this Court was whether the clerk of the session of gaol delivery of *Newgate* is entitled to a fee of 6s. 2d. in respect of each person capitally convicted and pardoned on condition of transportation; of each person capitally convicted and pardoned on condition of imprisonment with hard labour; of each felon sentenced to transportation; and of each felon liable to transportation or to be imprisoned and kept to hard labour, sentenced to be imprisoned and kept to hard labour; or of either and which class of offenders. The case, having been set down in the crown paper, was now argued.

Sir *W. W. Follett*, in support of the rule. First, as to the claim in respect of prisoners capitally convicted and pardoned on condition of transportation, or sentenced to transportation, it does not appear that, before stat. 16 G. 3. c. 43., there was any statutable provision as to the fees. But sect. 17 of that statute recognises the legality of the fee, which appears to have been, in fact, paid for the order of transportation of any offender. There is a similar recognition in sect. 30 of stat. 19 G. 3. c. 74. Then sect. 3 of stat. 55 G. 3. c. 156. and sect. 4 of stat. 56 G. 3. c. 27. enact that the same

(*a*) Some facts stated in the case, shewing an investigation of the matter at different stages, and a partial payment, are here omitted, the decision having rested simply on the right of the clerk.

fee

fee shall be paid to him which has been usually paid, or to which he is entitled. Now here it appears that there has been, by usage (of which the proceedings on the mandamus in 1778 are strong evidence), a certain fee paid to the officer on orders of transportation; that is within the meaning of the acts, as was held in *Fleetwood v. Finch (a)*. The question there arose upon the clause already referred to in sect. 30 of stat. 19 G. 3. c. 74.; and it was there held that proof of a certain fee having been usually received for the order of transportation, on a particular circuit, satisfied the words "as hath been usually paid, and would have been due." By the usage, therefore, and the statutes cited, and by stat. 1 & 2 G. 4. c. 6., the officer was entitled to the fees up to and at the passing of stat. 5 G. 4. c. 84. Sect. 21 of this act continues his title. The only difficulty arises from the fact of Mr. *Shelton* having chosen not to receive the fees to which he was unquestionably entitled by usage and statute. But that cannot prejudice his successors.

Next, as to the claim in respect of prisoners pardoned on condition of imprisonment, or sentenced to be imprisoned and kept to hard labour. The first statutory provision is that of stat. 16 G. 3. c. 43.; of which sects. 3 and 12 direct the officer to make out the certificate, and sect. 17 provides that the clerk shall have the fees as on orders of transportation. Then, by stat. 19 G. 3. c. 74. s. 30., the same provision is made for fees upon certificates under sect. 29. *Fleetwood v. Finch (a)* was decided on this statute. It is, indeed, no longer in force; and, since 1802, there has been no express provision on the subject: but, the duty having been continually performed by the officer, the question on this part of the

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case is, whether it requires a parliamentary enactment to entitle him to compensation. The work performed appears necessary to enable the keepers of the houses of correction to receive the prisoners from the Court. The recognition, by statute, of a claim as existing antecedently constitutes a parliamentary evidence of the legality of the claim, even after the statute has expired.

Sir *F. Pollock*, *contra*. The rule raises a question on four classes of cases, since transportation or hard labour may be imposed either by original sentence or by substitution. But the result must be the same as to the punishments by original sentence and by substitution; so that practically there are only two branches of the case. [*Per Curiam*. We need not trouble you, as to the claim in respect of the prisoners ordered to hard labour.]

Then, as to the claim in respect of the prisoners transported. There has been, in fact, no receipt of the fees since 1784. And it is to be observed that stat. 5 G. 4. c. 84. s. 21. makes two conditions essential; the payment must have been usual, *and* the officer must have been entitled to it. The earlier acts word the corresponding provision in the alternative. This change cannot have been accidental. [*Patteson J.* Then you say that the statute gives no fee at all.] None, where none has in fact been usually paid. It is said that Mr. *Shelton's* neglect could not prejudice his successor: and, strictly, it could not do so if the statute left the question merely on the legal right; but it has annexed the condition of usual payment, and this condition is negatived by a discontinuance of the user. Here the discontinuance has lasted long enough for a prescription. [*Coleridge J.* There could be no release of the successor's right.] It is not put as a case of strict prescription,

scription, but as a destruction of the statutable requisite. And there has been no receipt at all of fees from the treasurer, but only from the contractors. Now, by the Central Criminal Court Act, 4 & 5 W. 4. c. 36. s. 20., there is power given to settle the fees and allowances of the officers.

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Sir *W. W. Follett* in reply. The act last mentioned applies only to future service, and only to the service done for the Central Criminal Court. It is impossible to give the effect contended for to Mr. *Shelton's* discontinuance to take the fees. Every clerk has received them, including Mr. *Shelton*; they have, therefore, been usually paid. No time can be named at which the right to claim ceased.

Lord DENMAN C. J. As to the fees claimed in respect of the convicts sentenced to hard labour, we all agree that the mandamus cannot go. The work which has been performed was not required by act of parliament; nor is there any provision entitling the party performing it to the fees now claimed. As to the fees claimed in respect of the prisoners sentenced to transportation, no doubt great difficulty is created by the extraordinary combination of terms used in the statute, and by the variations from former acts. Stat. 55 G. 3. c. 156. s. 3. and stat. 56 G. 3. c. 27. s. 4. direct that the officer shall receive the same fee as has been usually paid, *or* he is entitled to: but stat. 5 G. 4. c. 84. s. 21. uses the words "the same fee as hath been usually paid, *and* he is lawfully entitled to receive." We have to give some sense to all the expressions. But, when we look to the intention fairly to be collected

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from the whole course of legislation, which is, that the fees shall be paid, as they have usually been paid, for the work done, we must put this case into a course for further inquiry, by making the rule for the mandamus absolute. Yet, as at present advised, I do not entertain any real doubt that this fee is payable. The legislature seems to mean that the fees shall be paid which are lawful, limiting the amount to what has been usually paid. I think that the remarkable circumstance which is stated, of the officer not having claimed the fee to which he was entitled from 1784, does not prevent the payments from being *usual* in the sense intended by the legislature. Suppose the case of a rich man not wanting the money and not asking for it, it is impossible to hold that he was to be deprived of his right, the fees having been usually paid up to his time. We might also suppose a bargain to have been made in any particular case, and advantages to have been offered to the particular officer in consideration of which he gave up his right. There may be many other facts accounting for this conduct, which is so singular, if unexplained. It cannot, at any rate, interfere with the operation of the legislative provision: and the rule, therefore, must in this respect be made absolute.

PATTESON J. As to the fees in respect of convicts sentenced to hard labour, there certainly appears to have been no legislative enactment requiring the continuance of the clerk's duty since 1802. Whether this was accidental, or the provision for it was intentionally omitted, we cannot inquire. We cannot say that the officer is still entitled to the fees; for there is now no statute

statute applicable to what he has performed. As to this claim, therefore, the rule must be discharged. The other point is a very difficult one, owing to the introduction of the word *and*, in stat. 5 G. 4. c. 84. s. 21. I have no difficulty at all on the words "lawfully entitled." In 1780 the officer was lawfully entitled to the fees, and he did receive them for the four years following. His predecessor had received them; and the officer for the time being could not destroy the legal right. Then, what is the meaning of the words "usually paid?" I cannot think they were used with the view of raising the question, whether the fees had in fact been paid for three, four, or any number of years. It would be unreasonable if, because a particular officer, for any reason or no reason at all, has not received them, such omission were held to be what the statute pointed to; and especially when the officer's predecessor had always received them, and when he himself had received them for four years. I think the suggestion, that the words refer to amount, is correct. Here there is no doubt as to the amount, which has never varied.

WILLIAMS J. As to the fees claimed in respect of the sentences to hard labour, I think that the authority cited by Sir *W. W. Follett* is fatal to his case. For the grounds there relied upon are here negatived, there being neither statute nor usage for paying the fees in question. With respect to the other claim, there is not sufficient difficulty to prevent the mandamus from going. It cannot be said that Mr. *Shelton's* discontinuing to receive the fees has put an end to the payments so as to exclude explanation. Cases such as those put by

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my Lord would explain the fact. And it is not pretended that the right has been taken away.

COLERIDGE J. From *Fleetwood v. Frick* (a) it is clear that the claim for the fees must rest on either usage or statute. Now, in the case of the fees claimed in respect of prisoners sentenced to hard labour, it cannot be said that there is ancient usage; the giving the certificates originated in statute. It is not enough that there should be shewn a consideration by work done. Beginning with stat. 5 Ann. c. 6., we find that the earliest legislative provisions made no mention of fees. Certain statutes, which have now expired, did recognise these fees, and made the payment legal. But now there is no such statutory provision in existence. There is, therefore, neither usage nor statute to support this part of the claim; and, so far as respects it, the rule must be discharged. Then, as to the other claim. Assuming the case against the officer as strongly as possible, and resting the claim entirely on stat. 5 G. 4. c. 84. s. 21., without calling in aid any qualification arising from the language of the intermediate acts, the case stands thus:—that, if the fees had been usually received, and the officer was entitled to them, when stat. 5 G. 4. c. 84. passed, his claim is good. There is no question but that he was entitled to them. Then, are the words “usually paid,” together with the fact that for some time an individual did not in fact receive the fees, so clear, that we ought not to put this case into a course of inquiry? The words may have reference to the different practice of different courts and places: I do not say that they

(a) 2 H. Bl. 220.

have;

have; but I suggest this, merely to shew that we ought to grant a further inquiry. Supposing issue to be joined on the question, whether these fees had been usually paid, a jury would be right in inquiring what had been done before Mr. *Shelton's* time, and might be justified in finding that they had been usually paid, though not in fact taken by him.

Rule discharged, as to the claim in respect of prisoners ordered to hard labour; absolute, so far as respects prisoners ordered to transportation (a).

(a) The mandamus never issued, the fees in respect of prisoners ordered to transportation having been paid upon this rule being made absolute.

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TODD against JEFFERY.

Monday,
November 13th.

IN *Easter* term 1836, a rule was obtained, calling on the above-mentioned plaintiff to shew cause why the verdict obtained before the sheriff (of *Northamptonshire*) in this action should not be set aside, and a nonsuit entered, or a verdict entered for the defendant, or a new trial had. In *Trinity* term, *June* 11th, 1836, cause was shewn before *Coleridge J.* in the Bail Court, and the rule was made absolute for entering a nonsuit. After that term, the plaintiff applied to *Coleridge J.*, at chambers, for liberty to move the full Court to revise his judgment given in the Bail Court. The learned Judge, after taking time for consideration, said that, under the

A rule made by a Judge sitting in the Bail Court is not more liable to be re-opened than a rule made in full Court.

And therefore a rule made by such Judge, unless under palpable misconception, cannot be re-opened after the term in which it was made; although the Judge, when applied to for

his assent, says that he is content it should be reconsidered, if the Court think proper.

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circumstances, the plaintiff might have liberty to make such application, if the full Court thought proper to entertain it. The plaintiff (having, by order of another Judge, obtained a stay of execution on paying a sum of money into court) moved, in this term, for a rule to shew cause why the rule of *June* 11th should not be opened, and the plaintiff be at liberty to shew cause as mentioned in the rule of *Easter* term 1836. A rule nisi having been granted,

Sir *W. W. Follett* and *Butt* now shewed cause against the rule of this term. *Rosset v. Hartley* (a) and *Rex v. The Sheriff of Devon* (b) are authorities against this application. Supposing that the Court would, under other circumstances, review a decision in the Bail Court, this is a rule adjudged upon in a former term.

Cresswell, contra. In *De Rutzen v. Lloyd* (c) a rule had been made absolute for a new trial; but this Court, in a subsequent term, allowed the rule to be re-opened, and a motion discussed for entering a nonsuit (d). The present application is made with the assent of the learned Judge, after taking time for consideration: that distinguishes the case from *Rex v. The Sheriff of Devon* (b). [*Coleridge* J. My recollection is, that I said,

(a) 1 *Harr. & Woll.* 581. See the end of this case.

(b) 2 *A. & E.* 296.

(c) 5 *A. & E.* 456.

(d) On that case being called on in the new trial paper (*January* 23d, 1836), Sir *J. Campbell*, Attorney-General, for the plaintiff, contended that it was already disposed of; but, it appearing, on reference to the Judge's notes, that leave had been given to move for a nonsuit, and the rule nisi having been granted in the alternative (for a new trial or a nonsuit), *The Court* (Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.) allowed the case to be gone into.

as far as I was concerned, I was content that the case should be reconsidered].

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Lord DENMAN C. J. In *De Rutzen v. Lloyd* (a) there had been a misconception as to the terms of the rule nisi. The decisions in the Bail Court are like decisions here. This Court will alter its own rules where there has been a plain misconception. But that is not so here; and, where a Judge, sitting in the Bail Court, has actually decided a case, even a doubt expressed by him cannot justify us in altering his decision after the term in which it was given.

PATTESON J. By stat. 11 G. 4. & 1 W. 4. c. 70. s. 1., the Judge sitting apart from the rest of the Court, for the purposes there mentioned, is to make rules and orders "in the same manner and with the same force and validity as may be done by the Court sitting in banc." We must, for the sake of all concerned in the administration of justice, consider a rule made in the Bail Court in the same light as if it were made here: and, if the rule in question had been made here, we could not alter it after the term in which it was made, unless there had been some palpable mistake. When the case of *Rex v. The Sheriff of Devon* (b) was brought before this Court, I remained of the same opinion as when I heard it discussed at chambers; and that, probably, would always be the case on such applications: it is not likely that a Judge, who has made a decision in the Bail Court, would alter his opinion when the case was brought here. What the Judge may say, on impor-

(a) 5 A. & E. 456.

(b) 2 A. & E. 296.

tunity,

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tunity, of being content that the matter should be re-considered, is of no consequence.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged (a).

(a) ROSSET against HARTLEY.

Saturday,
November 21st,
1835.

If a rule be obtained and discharged before the single Judge in the Bail Court, the full Court will not allow a rule for the same purpose to be discussed before them, though on affidavits discovering facts not previously stated.

Under Rule Hil. 2 W. 4. I. 32., the Court will not order money deposited in lieu of bail to be repaid to a defendant who has been arrested, on the ground that the writ omits one christian name, and mis-describes another, if the plaintiff have used due diligence in inquiring for the proper name: but a rule obtained by defendant, for such repayment, was discharged without costs, it not appearing that the inquiries had come to defendant's knowledge.

COWLING, in *Easter* term, 1835, obtained a rule to shew cause why 47*l.*, deposited in the hands of the sheriff of *Middlesex* by the defendant in this cause, in lieu of bail, should not be paid out of Court to the plaintiff, with costs, to be taxed out of the sum of 10*l.* deposited and brought into Court as aforesaid for the costs, the defendant not having put in and perfected bail. The defendant was arrested on 9th *January* 1835, and took out a summons to be discharged on entering a common appearance, which was discharged by *Williams J.* on 13th *January*; he then paid into the hands of the sheriff 47*l.*, the amount of the debt, and 10*l.* for costs, which sums the sheriff paid into Court. After eight days had expired, special bail not having been put in, and the defendant not having complied with the provisions of stat. 7 & 8 G. 4. c. 71., the plaintiff obtained a rule nisi to have the debt and costs paid to him, which rule was heard before *Williams J.* in the bail court, and discharged, on the authority (as stated by the Attorney-General in the argument in the present case) of *Cadby v. Parsons* (5 *Taunt.* 623.). A summons to the same effect, upon subsequent motion, was afterwards obtained, and heard, also, before *Williams J.*, who refused to make the order. The present affidavits stated facts for the purpose of shewing that the plaintiff had reasonable ground to believe that the defendant's name was *William Saville Hartley*, and had made attempts to ascertain the real name. Some of the facts were denied on affidavit in answer.

Sir *J. Campbell*, Attorney-General, obtained a rule (also of *Easter* term, 1835) to shew cause why the proceedings in this cause should not be set aside for irregularity, with costs, and the 47*l.* and 10*l.* be paid to the defendant, on affidavit that the defendant was arrested by the name of *William Saville Hartley*; his real name being *Winchcombe Henry Savile Hartley*. Other alleged irregularities were deposed to. No affidavit was filed in answer.

By order of the Court, the rules were now brought on together. It was assumed, in the argument, that the defendant had obtained a summons to have the money and costs paid to himself, which had been dis-

charged

charged at chambers; and the counsel, in arguing each of the present rules, referred to the affidavits on both rules.

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Sir *J. Campbell*, Attorney-General, now shewed cause against *Cowling's* rule. The case has been disposed of by the discharge of the former rule nisi in the Bail Court. A party who obtains a rule nisi cannot put in affidavits in answer to affidavits made in opposition to the rule. Neither, therefore, ought he to make the same application a second time on fresh affidavits.

Cowling, *contra*. Facts are here alleged which were not before stated. The rule that a second application may not be made holds only where the second is vexatious. Besides, it may be said that there are contrary decisions; the defendant's summons having been discharged, as well as the plaintiff's rule nisi.

PATTERSON J. (absente Lord *Denman*, C. J.) We must adhere strictly to the rule; and the more so, since two courts sit to dispose of these cases, and any relaxation would encourage parties to try experiments first in one court and then in the other. If the present application be, in effect, the same as the former one, it does not signify whether the statement of facts be new or not.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged with costs.

(See *Bodfield v. Padmore*, 5 *A. & E.* 785., note (a), and the authorities cited in the same note.)

Cowling then shewed cause against the Attorney-General's rule. Due diligence has been used; and, therefore, under *R. H. 2 W. 4. I. 32.* (3 *B. & Ad.* 378.), the defendant is not to be discharged out of custody, nor the bail bond to be cancelled on motion. [*Coleridge* J. What is to become of the deposit?] The defendant must wait the year to see what steps the plaintiff takes. Further, the Judge at chambers has decided the case; this application, therefore, is within the principle of the decision on the other rule.

Sir *J. Campbell*, Attorney-General, *contra*. This is not a description by initials, or merely by a wrong name, or without a christian name: it is a case of omission of a name, which is not within the rule.

PATTERSON J. (absente Lord *Denman* C. J.) I think there has been due diligence; and the defendant, if in custody, would not be entitled to be discharged. But, as we do not find that the defendant had knowledge of the inquiry respecting his name, there should be no costs.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged without costs.

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Tuesday,
November 14th.

WILTON *against* CHAMBERS.

An attorney who has once been admitted, and obtained his certificate, and practised, and has then omitted to take out his certificate, is precluded, by stat. 37 G. 3. c. 90. ss. 26, 31, from resuming practice till he has been re-admitted.

So, if he has been re-admitted, and has, after such re-admission, omitted to take out his certificate.

Although he has not practised during such omission.

And although, after such omission, he take out his certificate, he cannot sue for business done after such taking out of the certificate, and before re-admission.

If he obtain security for

payment for business so done, the Court will order it to be delivered up, and will set aside judgments and executions on warrants of attorney given for such business.

IN Hilary term last, Sir *J. Campbell*, Attorney-General, obtained a rule to shew cause why a warrant of attorney, given by the defendant to the plaintiff, should not be cancelled, and why certain judgments, recovered by the plaintiff against the defendant, should not be vacated, and all writs of execution issued under them, or any or either of them, be set aside, and why certain bills of exchange and other securities, given by the defendant to the plaintiff, should not be given up to be cancelled. The facts (as stated by the Lord Chief Justice in delivering judgment) were, that the warrant and other securities, &c., mentioned in the rule were obtained by the plaintiff from the defendant for business done by him, as attorney for the defendant, in and subsequent to the year 1826 (*a*). The ground of the motion was, that the plaintiff was disabled from practising as an attorney by sect. 31 of stat. 37 G. 3. c. 90. The plaintiff was admitted an attorney many years ago, and took out his certificate till 1820 (*b*); he then ceased to do so for three years; and, in 1823, he obtained a rule for his re-admission; he did not, however, take out any certificate until 1826; and he swore that, in the interval, he did not practise (*c*).

(*a*) Down to February 1831.

(*b*) He had practised before 1820.

(*c*) The defendant swore that, while the plaintiff acted for him as attorney, he had no doubt of his qualification, nor any suspicion on the subject till about a month before the rule was obtained.

Erle,

Erle, Cresswell, Shee, W. H. Watson, and Joseph Addison, now shewed cause (a). The question is, whether the plaintiff, having once been enrolled and begun to practise, and having afterwards, during a time in which he did not practise, omitted to take out his certificate, but having taken it out as soon as he recommenced practice, was incompetent to practise without being formally re-admitted. By stat. 37 G. 3. c. 90. s. 31., if an attorney "neglect," after admission, &c., to obtain his certificate, he shall be incapable of practising, and his admission, &c., "shall be from thenceforth null and void;" but the proviso allows of a re-admission on paying arrears of duty and a penalty at the discretion of the Court. The original statute as to admission, 2 G. 2. c. 23., was passed to secure the competence of attorneys by the examination directed under that act: the other statutes respecting certificates are merely fiscal, and are not directed to secure the competence of the attorney. The object of stat. 2 G. 2. c. 23. is satisfied by the original admission; that of the certificate statutes by the taking out of the certificate while the attorney is in actual practice. Stat. 25 G. 3. c. 80. is entitled "An act for granting to his Majesty certain duties &c.;" and sect. 1 requires every attorney to take out a certificate "previous to his commencing or defending any suit or prosecution;" and sect. 3 requires him to deliver a note of his name and residence annually, "during such time as he shall continue so to practise;" that is, as appears from the earlier part of the section, to commence, carry on, &c., any action, &c.: and the language

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against
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(a) Before Lord Denman C. J., Patteson, Williams, and Coleridge J^s. The counsel appeared for different parties who had become interested in the result under various proceedings in this Court.

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of sects. 5 and 7 refers in the same manner to practice. Stat. 37 G. 3. c. 90. requires the certificate "during such time as he shall continue so to practise;" and sects. 27 and 30 confine the regulation to actual practice. Sect. 31 of the same act, by the words "neglect to obtain his certificate thereof, *in the manner before directed,*" must refer to a "neglect" of the duty prescribed by the former sections: if the attorney do not practise, there is no neglect; and this remark is strengthened by the enactment of sect. 31 being, to a certain extent, penal, for it deprives the party of his previous admission; and it was considered to be penal by *Williams J.* in *Hodkinson v. Mayer (a)*. Then stat. 55 G. 3. c. 184. Schedule, Part I. *Certificate*, applies to persons who "shall commence, prosecute, carry on or defend any action," &c. This may be considered as a legislative exposition of stat. 37 G. 3. c. 90. Therefore, on the language of the statutes, the fair construction is, that a party once admitted upon examination continues on the roll till he violate the principle of the certificate acts by practising without a certificate.

The decided cases bear out this construction. In *Ex parte Jones (b)* *Parke J.* considered that an attorney who had been admitted, but had never taken out his certificate nor practised, required no re-admission: that must have been on the principle that re-admission is required only where the taking out of a certificate has been omitted during actual practice. Why should any re-admission be required after a previous re-admission, if there has been no subsequent practice, more than after

(a) 1 N. & P. 397. & C. (not same dictum), 6 A. & E. 194.

(b) 2 Dowl. P. C. 451.

the original admission? [*Patteson J.* The Court every day re-admits attorneys who have once been in practice, but have afterwards omitted to take out their certificate, though not practising.] It is true that *Parke J.*, in the case referred to, says that "the rule only applies to those cases in which an attorney has taken out his certificate after admission, and then ceased to take it out:" but there is no rule besides the act; and, here, the only question on the act is, whether, after the re-admission, there having been no recommencement of practice, the attorney is off the roll for "neglect." In *Hilleary v. Hungate* (a) *Littledale J.* concurred in the view taken by *Parke J.* in *Ex parte Jones* (b). *Ex parte Nicholas* (c) has been cited as an authority the other way; but there the attorney himself applied for re-admission, and the point was not contested. A fine was there imposed: whereas it is clear that no fine is to be imposed where the attorney has not practised during the time for which he has omitted taking out his certificate; *Ex parte Clarke* (d), *Ex parte Calland* (e), *Ex parte Richards* (g); and no arrears are demanded, as appears from the above cases, and from *Ex parte Cunningham* (h) and *Ex parte Smith* (i). Now, this shews that sect. 31 of stat. 37 G. 3. c. 90. does not apply; for, if a re-admission were necessary under the section, it could be allowed only on payment of arrears and penalty. These cases are confirmed by *Ex parte Matson* (k), where *Abbott C. J.* said, that "neglect" in sect. 31 of stat. 37 G. 3. c. 90. imported culpability; and asked whether an attorney

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(a) 3 Dowl. P. C. 56.

(b) 2 Dowl. P. C. 451.

(c) 6 Taunt. 408. S. C. 2 Marsh. 123.

(d) 2 B. & Ald. 314.

(e) Note (a) to *Ex parte Clarke*, 2 B. & Ald. 315.

(g) 1 Chitt. 101.

(h) 1 Bing. 91.

(i) 1 Chitt. 692.

(k) 2 D. & R. 238.

could

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could be said to neglect to take out his certificate who did not practise. [*Patteson J.* Then there never could be a re-admission without some fine and payment of all arrears.] There could not, when the re-admission was rendered necessary by stat. 37 G. 3. c. 90. s. 31. [*Patteson J.* Then all the re-admissions made without fine and payment of arrears have been wrong.] They have been superfluous, and applied for ex abundanti cautela. In the *Matter of Hodgson and Ross* (a) turned upon a different question, but illustrates this. There the counsel against the attorney contended that, stat. 37 G. 3. c. 90. s. 31. having made the previous admission null and void where the attorney had practised without taking out his certificate, an attorney practising after such neglect was liable to be imprisoned, as practising without being admitted, under stat. 22 G. 2. c. 46. s. 11.; but the Court refused to consider the admission void to this extent; and *Patteson J.* pointed out the distinction between the objects of stat. 22 G. 2. c. 46. and stat. 37 G. 3. c. 90., saying that the latter was “merely a statutory regulation in favour of the revenue.” [*Cole-ridge J.* The statute seems to contemplate a neglect as preceding the incapability to practise.] *Slack v. Wilkins* (b) is inapplicable here: in that case there appears to have been culpable neglect; for the party did not set up any pretence of having ceased to practise while he did not take out his certificate. If the mere omission to take out a certificate, even while the attorney does not practise, made the admission entirely void, and took the attorney absolutely off the roll till re-admission, it would never be necessary to apply to

(a) 3 A. & E. 224.

(b) 1 C. & M. 23. S. C. 3 Tyrwh. 158.

be struck off the roll: the merely discontinuing to practise and take out the certificate would have the effect required. The omission to take out the certificate is cured, so far as regards suing for fees, by stat. 7 G. 4. c. 44. s. 3. And, even supposing sect. 31 of stat. 37 G. 3. c. 90. to be applicable, it can merely, under stat. 2 G. 2. c. 23. s. 1., incapacitate the Plaintiff from recovering his fees by action; it could not entitle a party, who had paid the fees, to recover them back: nor, therefore, can it deprive the plaintiff here of the security which the defendant has placed in his hands.

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Sir *J. Campbell*, Attorney-General, and Sir *W. W. Follett*, contra. The argument on the other side is contradicted by the uniform course of practice. A party who is ready to receive clients is, within the spirit of the statutes, in practice. Thus *Bayley J.* discharged a barrister from arrest, who was attending the *Oxford* circuit, though he had no brief. It is said that stat. 37 G. 3. c. 90. is fiscal: it is, however, not exclusively so; and it has always been understood that the Court would interpret its provisions with a view to the general regularity of the practice of attorneys. The rule of *Mich.* 1654, mentioned in *Prior v. Moore (a)*, had a similar object. It is fit that, in exercising their discretion as to re-admitting under sect. 31, they should inquire how the attorney has employed his time while he has been uncertificated. On the construction now contended for, this superintendence would be evaded. In 1 *Tidd's Practice* 78 (ed. 9.), it is said that, in the Common Pleas, "Where a person is admitted an

(a) 2 M. & S. 605. And see 1 *Tidd's Prac.* 82 (ed. 9.). *Peacock's Rules*, p. 21.

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attorney, and omits to take out his certificate within the year, he must be readmitted, before he can practise, though he should never have practised on his former admission." The Court require a term's notice before readmission; the rules on this point are stated in 1 *Tidd*, 79 (9th ed.); but, if readmission be altogether needless, these regulations are nugatory. An attorney, to be entitled to practise, must be on the roll and be certificated; and it may be true that he may allow an interval to elapse between perfecting the two qualifications, and therefore that, if he has never practised at all after his first admission till he has taken out his certificate, he requires no readmission. The cases cited on the other side may prove thus much. But, when once the qualifications are perfected, the attorney is understood to be in practice; if, from thenceforth, he neglects to take out his certificate, his case falls within the terms of stat. 37 G. 3. c. 90. s. 31.; he does "neglect to obtain his certificate thereof, *in the manner before directed*," that is, to renew his certificate during all the time in which he is a candidate for practice. And the same answer applies to the expressions in other statutes which have been insisted upon. In *Ex parte Nicholas* (a) the readmission was on the terms of *now* taking out the certificate. Lord *Ellenborough*, in *Skirrow v. Tagg* (b), insists on the necessity of taking out the certificate from the very time prescribed by the statute. In *Coren v. Sharpe* (c) it was never contended that the plaintiff could have recovered without having been readmitted. In *Slack v. Wilkins* (d) the attorney was considered to be off the roll by his omission to take out a certificate; the

(a) 6 *Taunt.* 408. *S. C.* 2 *Marsh.* 123.(b) 5 *M. & S.* 281.(c) 1 *B. & Ad.* 386.(d) 1 *C. & M.* 23. *S. C.* 3 *Tyrrwh.* 158.

actual

actual practising without certificate was no ingredient in this part of the decision: the case is therefore an authority for the defendant. And it differs from *Ex parte Jones* (a), because there no certificate had ever been taken out; a circumstance expressly noticed by Parke J. In *Hilleary v. Hungate* (b) there was no decision on this point; and the learned Judge expressed himself very doubtfully. It is said that the readmission without payment of arrears shews that sect. 31 of stat. 37 G. 3. c. 90. does not apply. If such be the inference drawn, it might be better that the practice should be altered than a doubt thrown upon the necessity of readmission. The form of affidavit in *Tidd's Forms*, 12. (ed. 1828), shews that it is not enough for the attorney to swear that he has not actually practised, but that he must swear to a bonâ fide abstinence from practice. The question on readmission is only as to the terms: if there has been an abstinence from practice, or if there be any sufficient excuse, the arrears are remitted, not otherwise. And so it is as to the question, whether there need be a term's notice or not, as in *Ex parte Bartlett* (c) and *Ex parte Watson* (d). Stat. 7 G. 4. c. 44. s. 3. has not the general application contended for: if it had, it would protect parties guilty of neglecting to take out the certificate during actual practice. It merely extends to cases of irregularity as to the time of taking out; and it does not cure the want of readmission. The Court of Chancery, in its practice under stat. 37 G. 3. c. 90., has adopted the construction for which the defendant contends.

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Cur. adv. vult.

(a) 2 Dowl. P. C. 451.

(b) 3 Dowl. P. C. 56.

(c) 1 Chit. 207.

(d) 1 Chit. 208.

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Lord DENMAN C. J. in this term (*November 25th*) delivered the judgment of the Court. After stating the facts (as *antè* p. 524.), his Lordship proceeded as follows.

It is contended, on the plaintiff's behalf, that the twenty-sixth section of stat. 37 G. 3. c. 90. requires an attorney to take his certificate only "during such time as he shall continue so to practise;" that the thirty-first section applies only where an attorney "shall neglect to obtain his certificate" "in *the manner before directed*, for the space of one whole year," that is, shall neglect to take it out "during such time as he shall continue so to practise;" that it is unnecessary for an attorney who does not continue to practise to take out any certificate; and that he is at liberty, at any interval of time, to resume his practice on taking out a fresh certificate, without any application to be readmitted.

The argument is very ingeniously put upon the words of the statute; and, if this were a new statute, on which we had now, for the first time, to put a construction, much weight might be given to that argument. But we are of opinion that this statute has received a construction, from the uniform course and practice of the courts in respect to it, from which we ought not to depart. It is true that no express decision is found in the reports establishing that, in all cases where an attorney who has once practised has omitted to take out his certificate for a year, it is necessary that he should be readmitted, although he may not have practised in that particular year. Yet the instances in which applications for readmission under such circumstances have been made, and in which the courts have inquired into the conduct of the attorney in the interim,

and

and have regulated the terms on which he should be readmitted, are without number.

We think such a construction of the statute highly beneficial to the public and to the profession, as it enables the court to inquire into the conduct of its officers, whilst they have, as it were, suspended themselves from their office, and to prevent the readmission of such persons as may have been engaged in any disreputable pursuit during that time. The statute is said, indeed, in several cases, to be one of fiscal regulation, and no doubt it is so primarily; and, for this reason, in the cases cited at the bar, the courts have refused to give it a retrospective effect, so as to subject attorneys, who have neglected to take out their certificate under this act, to penalties under prior acts of parliament passed altogether alio intuitu. With these cases we entirely agree; but the disability now under consideration is created by this very same act, viz., 37 G. 3. c. 90. s. 31. We do not put it on the thirtieth section, which perhaps may not apply. Neither do we at all infringe upon those cases in which, on account of the clients' interests, or those of third parties, the courts have refused to interfere upon any objection arising under this statute.

The general rule being thus established, the next question is, whether any distinction arises from the circumstance of Mr. *Wilton* having been readmitted in 1823, and not having practised at all from that time till 1826, when he had his certificate. It was certainly held in *Ex parte Jones* (a) that an attorney need not be readmitted who had suffered more than a year to elapse between his original admission and the taking out of his

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(a) 2 Dowl. P. C. 451.

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certificate, never having practised at all prior to the taking it out: and it is difficult, on the first view, to see any distinction between an original admission and a re-admission in this respect. The attention of the learned Judge who decided that case does not appear to have been drawn to *Ex parte Nicholas* (a); and it is not, therefore, perhaps so strong an authority as it might otherwise have been: but, assuming the decision to be right, we think that it does not govern this case. We are of opinion that an attorney, on readmission, is bound to take out his certificate forthwith: the Court deals with his application as made for readmission to *practise*, and certainly would not grant the rule in any case, if it was informed at the time that the attorney did not mean to practise for some time; for it could not then have any control over, or security for, his good conduct in the meantime. In *Coren v. Sharpe* (b) the attorney who had been readmitted had taken out his certificate; and the question was only whether a fresh entry on the roll was necessary. In the case of an original admission, an articled clerk, who has complied with the statutes in that respect, and passed his examination, is entitled to be admitted on the roll, and the Court cannot impose any conditions.

For these reasons we think that Mr. *Wilton* in 1826 was incapable of practising, and that his admission was null and void by reason of the statute 37 G. 3. c. 90., or, in other words, that he was off the roll of attorneys.

It remains to be considered whether this disability vitiates the securities he has obtained. Now, if he could not sue the defendant for work done as an attorney, he

(a) 6 Taunt. 408. S. C. 2 Marsh. 123.

(b) 1 B. & Ad. 386.

not being lawfully an attorney, as we think he could not, we are of opinion that, in order to give effect to the disabling statute, we are bound to hold that he cannot avail himself of the judgment and securities he has obtained in respect of that work. In this particular case it is sworn that his disability was unknown to his client; and probably that would be so in most similar instances: but we do not rely on that circumstance. We think that whatever is obtained through the medium of an illegal practice is itself illegal.

The rule, therefore, must be made absolute, as to all securities for business done in his character of an attorney (*a*).

(*a*) By the rule, as ultimately drawn up, after reciting the decision of the Court that the plaintiff was not entitled to practise, &c., and that the rule should be made absolute as to the judgments, executions, and other securities therein mentioned, to such extent as the same relate to business done by the plaintiff as an attorney of this Court, it was ordered, "That it be referred to the Master to apply to the judgments, securities, executions and bills of exchange in the said rule mentioned, the decision of the Court, and to decide on the other matters of the said rule on which the Court has not given an opinion, with liberty to the plaintiff to apply to the Court for costs, if he shall think fit so to do."

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DOE on the Demise of ELLIS *against* HARDY.

Thursday,
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This case is reported, 6 *A. & E.* 335.

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Saturday,
November 18th.

The QUEEN against GOODE.

A party having been indicted for a misdemeanor in uttering seditious words, and, upon his arraignment, refusing to plead, and shewing symptoms of insanity, and an inquest being forthwith taken under stat. 40 G. 3. c. 94. s. 2., to try whether he was insane or not: Held,

1. That the jury might form their own judgment of the present state of the defendant's mind from his demeanour while the inquest was being taken; and might thereupon find him to be insane without any evidence being given as to his present state.

2. That, upon the prisoner shewing strong symptoms of insanity in Court during the taking of the inquest, it became unnecessary to ask him whether he would cross-examine any remarks or evidence.

A HABEAS CORPUS issued to the keeper of *Tothill Fields* Bridewell, commanding him, immediately after the receipt &c., to bring the body of *John Goode* into Court, being committed &c., together with the day and cause &c., to undergo &c. The prisoner being brought into Court this day, in custody, the return was read in Court, which set forth a warrant by a justice to receive into custody the body of a man calling himself *John the Second, King of England*, charged upon oath with unlawfully and seditiously making use of certain seditious words and threats against her Majesty the Queen, in the presence of her Majesty, &c.

Sir *John Campbell*, Attorney-General (with whom was *Wightman*), then moved that the prisoner might be arraigned. The indictment, which had been found by the grand jury, was accordingly read by the Secondary of the Crown Office. It charged that the defendant unlawfully, &c., contriving &c., to scandalize, &c., our Lady the Queen, &c., unlawfully, maliciously, and seditiously, in the presence of our said Lady &c., and in the presence and hearing of divers lieges &c., did speak, &c., of and concerning our said Queen, and addressed to our said Queen, the words, to wit, "You are an usurper, I will get you off the throne," (with innuendoes,) to the intent that she should be brought into disrepute, &c. The prisoner was committed to the gaol, and the other counts, slightly

The defendant, being called upon to plead, shewed clear symptoms of insanity in his demeanour; and, on his not pleading, the Attorney-General prayed that an inquest might be sworn to try whether he was insane or not. The sheriff being in attendance with an inquest, a jury was immediately sworn (*a*); and the inquest was taken at bar before Lord *Denman* C. J., *Patteson*, *Williams*, and *Coleridge* Js.

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The *Attorney-General* then addressed the jury, and stated that, under stat. 40 G. 3. c. 94. s. 2., they were to find whether the prisoner was insane or not; that this statute applied to a misdemeanor (*b*); and that by common law also the Crown had the power of detaining an insane defendant on a criminal charge, and an inquest might be sworn to try the fact of the insanity (*c*). He also referred to sect. 4 of the above statute.

Witnesses

(*a*) The following was the oath administered: —“ You shall diligently inquire and true presentment make, for and on behalf of our Sovereign Lady the Queen, whether *John Goode*, the defendant, who stands indicted for a misdemeanor, be insane or not, and a true verdict give, according to the best of your understanding; so help you God.”

(*b*) See *Rex v. Little*, *Russ. & R. C. R.* 430.

(*c*) See *Rex v. Frith*, 22 *How. St. Tr.* 311.

“ If a person of non sane memory commit homicide during such his insanity, and continue so till the time of his arraignment, such person shall neither be arraigned nor tried, but remitted to gaol, there to remain in expectation of the King's grace to pardon him. 26 *Ass.* 27. 3 *E. 3.* 351.” [*Loh. Abr.* 26 *Ed. 3.* 123 B. pl. 27. *Fitz. Gr. Abr.* 219 a. *Coron et pleas del Coron.* 7. “ But it seems in such a case it is prudence to advise as to inquire touching his madness, whether it was before or after the homicide, as was done in the case of 3 *E. 3.* 351. 154.” (p. 107.) “ But it is not to be done, or by means of the jury, but by the discretion of the court, and it is not to be done after the arraignment.”

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Witnesses were then examined who gave evidence of the defendant's insanity at a time very shortly preceding the trial; and the defendant continued to exhibit, in his demeanour, violent symptoms of mental derangement. It being proposed to call a medical man, to prove the present state of the defendant's mind,

Lord DENMAN C. J. said, I think it is quite unnecessary. We can judge of that by what has passed in Court just now. Neither do I think it necessary to ask the defendant whether he wishes to cross-examine the witnesses, or to say or prove anything for himself. From what we have seen, it is perfectly clear that this would be a mockery and waste of time, and an useless prolongation of a painful proceeding.

His Lordship having shortly charged the jury, they returned that the defendant was insane.

The *Attorney-General* then moved to have the inquest recorded, and that the defendant might be kept in safe custody till the Queen's pleasure should be known.

Ordered accordingly (a).

understanding, especially in case any doubt appear upon the evidence touching the guilt of the fact, and this *in favorem vite*; and if there be no colour of evidence to prove him guilty, or if there be a pregnant evidence to prove his insanity at the time of the fact committed, then upon the same favour of life and liberty it is fit it should be proceeded in the trial, in order to his acquittal and enlargement." *Hale, Pl. C. Part. 1. c. 4. p. 35.*

This passage of *Hale*, as shewing the power of the Court to discharge the jury, was recognised by *Foster J.* in the *Proceedings against A. and C. Kinloch*, 18 *How. St. Tr.* 411.

(a) The following is the entry.

"Middlesex. The Queen against *John Goode*. — The defendant being brought here into Court, in the custody of the governor of the *Tothill Fields Bridewell*

Bridewell in and for the city and liberty of *Westminster*, by virtue of a writ of habeas corpus, it is ordered that the said writ and the return made thereto be filed; and the said defendant is now here in Court arraigned upon the indictment found against him in this Court, for certain misdemeanors in speaking and publishing certain scandalous and seditious words of and concerning our Sovereign Lady the Queen, and is asked by the Court here whether he be guilty of the premises charged upon him by the said indictment or not. Whereupon the said defendant doth refuse to answer to the said indictment; and, it appearing to this Court that the said defendant may be insane, so that he cannot be tried upon the said indictment, therefore, on the prayer of Sir *John Campbell*, Knt., Her Majesty's Attorney-General, it is ordered that a jury in this behalf do immediately come here into Court to try and inquire for and on behalf of our said Sovereign Lady the Queen, whether the said defendant be insane or not. And immediately thereupon a jury, being impanelled and returned for that purpose by the sheriff of the said county of *Middlesex*, come here into Court, and, being elected, tried, and sworn to speak the truth touching and concerning the premises aforesaid, say, upon their oath, that the said defendant is insane. And the said Attorney-General, for and on behalf of our said Sovereign Lady the Queen, prays the said Court here that the finding of the said jury may be recorded. It is thereupon ordered by the said Court here that the said finding of the said jury be recorded, and that the said defendant be kept in strict custody in the said Bridewell until Her Majesty's pleasure in the premises shall be known. And the said defendant is now, here in Court, committed to the custody of the keeper of the said Bridewell, to be by him kept in strict custody until Her Majesty's pleasure shall be known."

"On the motion of Mr. Attorney-General.
By the Court."

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—
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Saturday,
November 18th.

MARTIN *against* GILHAM.

On a declaration alleging that defendant, being tenant to plaintiff, cut down and destroyed trees on the premises, "and otherwise used the said premises," "in so untenant-like and improper a manner," that they became and were, and are, dilapidated and in bad and untenantable condition, the plaintiff cannot recover for permissive waste.

DECLARATION stated that the defendant, before and at the time of the committing &c., to wit on &c., held certain premises and gardens with the appurtenances in &c., as tenant thereof to plaintiff; and thereupon, to wit on &c., it became and was the duty of defendant "to use the said premises and gardens in a tenant-like and proper manner, and not to commit any depredation or waste thereto during the said tenancy:" and, although the said tenancy continued for a long time, viz. from thence until &c., yet defendant, not regarding &c., but contriving to injure plaintiff in his reversionary estate and interest of and in the said premises and gardens &c., during the continuance of the said tenancy, viz. on &c., and on divers other days and times, "wrongfully and unjustly, and in an untenant-like and improper manner, felled, cut down, damaged, destroyed, rooted up and loosened divers, viz. twenty peach-trees, twenty nectarine-trees," &c., of great value, &c., then growing and being in and upon the said premises and gardens, "and otherwise used the said premises and gardens in so untenant-like and improper a manner that the same became and were and still are greatly dilapidated, and in bad and untenantable order and condition, and greatly deteriorated in value, and the said premises and gardens have been from the said" &c., "by means of the premises, hitherto, unoccupied, and the plaintiff hath been and is hindered and prevented from letting the same to the damage" &c. Plea, Not Guilty. On the trial

trial before *Gaselee J.*, at the *Suffolk* Spring assizes, 1836, it appeared that the defendant was tenant from year to year. The only waste proved was permissive. It was objected that, the defendant being tenant only from year to year, such evidence did not support the action. A verdict was taken for the plaintiff, with 10*l.* damages, if this Court should be of opinion that the plaintiff, on this record, was entitled to recover for permissive waste; a verdict to be entered for the defendant if the Court should think the plaintiff entitled to recover only for voluntary waste committed.

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Kelly, in the ensuing term, moved to enter a verdict for the defendant. *Gibson v. Wells (a)* and *Herne v. Benbow (b)* shew, generally, that this action does not lie, the only waste proved being permissive. And, even if this were otherwise, the plaintiff cannot recover, because permissive waste is not alleged in the declaration. A rule nisi was granted.

Storks Serjt., now shewed cause, and contended that an action for permissive waste would lie against a tenant from year to year, though not against a tenant at will (c).

[*Patteson*(a) 1 *New Rep.* 290.(b) 4 *Taunt.* 764.

(c) The authorities referred to as supporting, or not conclusive against this proposition were: — *The Countess of Shrewsbury's Case*, 5 *Rep.* 13 b.; Lord Coke's observations on the statute of *Marlebridge*, 52 *H. 3.*, c. 23., and statute of *Gloucester*, 6 *Ed. 1. stat. 1.*, c. 5.; (see *Co. Litt.* 57 a., 2 *Inst.* 145. 299.); *Littleton*, sect. 71.; *Gibson v. Wells*, 1 *New Rep.* 290.; *Herne v. Benbow*, 4 *Taunt.* 764.; *Jones v. Hill*, 7 *Taunt.* 392.; *Beale v. Sanders*, 3 *New Ca.* 850.; *Horsefall v. Mather*, *Holt's N. P. C.* 7.; *Ferguson v. ———*, 2 *Esp. N. P. C.* 590. See Notes (7) and [k] to *Pomfret v. Ricroft*, 1 *Wms. Saund.* 323 b., and notes (7) and [b] to *Greene v. Cole*, 2 *Wms. Saund.* 252 a.

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[*Patteson J.* mentioned *Torriano v. Young (a).*] The distinction, now relied upon, between tenant at will and tenant for years, in that case, was not noticed. Further, it will be contended here that the declaration does not allege permissive waste; but it is sufficiently alleged by the words, "and otherwise used the said premises and gardens in so untenant-like and improper a manner that the same became and were and still are greatly dilapidated and in bad and untenantable order," &c. The doctrine, therefore, laid down, in note (7) to *Greene v. Cole (b)*, citing *Harris v. Mantle (c)*, that the nature and kind of waste must be specified, will not affect the plaintiff in this case. A general allegation of voluntary waste will let in evidence of permissive waste. [*Patteson J.* A particular act of waste is alleged here, in destroying trees; what general allegation is there under which permissive waste could be proved?] None, if the act of waste particularly alleged be taken to determine the character of all that is stated afterwards. In *Gardiner v. Croasdale (d)* the plaintiff declared, on a policy of insurance, as for a total loss, but proved only a partial one; and it was held that he might recover, the ground of action being the same, whether the loss was total or partial. So here, the ground of the action is the non-repair, and, whether that has arisen from voluntary or from permissive waste, the plaintiff may recover on this declaration, the allegations being large enough to include both kinds of injury.

Kelly, contra, was stopped by the Court.

(a) 6 Car. & P. 8.

(b) 2 Wms. Saund. 252 c.

(c) 3 T. R. 307.

(d) 2 Burr. 904.

Lord

LORD DENMAN C. J. It would be confounding things which are very different, to say that a charge of voluntary waste is a charge of permissive waste. The declaration in this case clearly charges voluntary waste, and is inconsistent with the case proved.

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PATTESON J. There are no words of suffering and permitting, in this declaration; but it charges that the defendant "used the premises" in so untenant-like a manner that they became dilapidated. *Gardiner v. Croasdale* (a) does not apply. The question there was merely of amount. The case would have been more like the present, if the loss alleged had been by perils of the seas, and a loss by fire had been proved.

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

(a) 2 Burr. 904.

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certificate, never having practised at all prior to the taking it out: and it is difficult, on the first view, to see any distinction between an original admission and a re-admission in this respect. The attention of the learned Judge who decided that case does not appear to have been drawn to *Ex parte Nicholas* (a); and it is not, therefore, perhaps so strong an authority as it might otherwise have been: but, assuming the decision to be right, we think that it does not govern this case. We are of opinion that an attorney, on readmission, is bound to take out his certificate forthwith: the Court deals with his application as made for readmission to *practise*, and certainly would not grant the rule in any case, if it was informed at the time that the attorney did not mean to practise for some time; for it could not then have any control over, or security for, his good conduct in the meantime. In *Coren v. Sharpe* (b) the attorney who had been readmitted had taken out his certificate; and the question was only whether a fresh entry on the roll was necessary. In the case of an original admission, an articulated clerk, who has complied with the statutes in that respect, and passed his examination, is entitled to be admitted on the roll, and the Court cannot impose any conditions.

For these reasons we think that Mr. *Wilton* in 1826 was incapable of practising, and that his admission was null and void by reason of the statute 37 G. 3. c. 90., or, in other words, that he was off the roll of attorneys.

It remains to be considered whether this disability vitiates the securities he has obtained. Now, if he could not sue the defendant for work done as an attorney, he

(a) 6 Taunt. 408. S. C. 2 Marsh. 123.

(b) 1 B. & Ad. 386.

not being lawfully an attorney, as we think he could not, we are of opinion that, in order to give effect to the disabling statute, we are bound to hold that he cannot avail himself of the judgment and securities he has obtained in respect of that work. In this particular case it is sworn that his disability was unknown to his client; and probably that would be so in most similar instances: but we do not rely on that circumstance. We think that whatever is obtained through the medium of an illegal practice is itself illegal.

The rule, therefore, must be made absolute, as to all securities for business done in his character of an attorney (*a*).

(*a*) By the rule, as ultimately drawn up, after reciting the decision of the Court that the plaintiff was not entitled to practise, &c., and that the rule should be made absolute as to the judgments, executions, and other securities therein mentioned, to such extent as the same relate to business done by the plaintiff as an attorney of this Court, it was ordered, "That it be referred to the Master to apply to the judgments, securities, executions and bills of exchange in the said rule mentioned, the decision of the Court, and to decide on the other matters of the said rule on which the Court has not given an opinion, with liberty to the plaintiff to apply to the Court for costs, if he shall think fit so to do."

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DOE on the Demise of ELLIS *against* HARDY.

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This case is reported, 6 *A. & E.* 335.

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dissolution of the contract having been proved. But *Archard v. Hornor* (a) is a contrary decision. And *Coleridge J.*, referring to that case in *Ridgway v. The Hungerford Market Company* (b), appeared to doubt whether the plaintiff there, if otherwise entitled, could have recovered for wages which would have been due after the time of dismissal, without a special count. *Pagani v. Gandolfi* (c), which may be cited on the other side, was a special action on the agreement.

Gunning, contra. The plaintiff is entitled to the second quarter's wages, minus the 4*l.* paid into Court. *Gandell v. Pontigny* (d) is in point. Lord *Ellenborough* there (e) states as a ground of the plaintiff's right to recover, that, "having served a part of the quarter and being willing to serve the residue, in contemplation of law he may be considered to have served the whole." He might, therefore, have commenced his action before the term had expired. In *Collins v. Price* (g), where a child had been placed at a boarding-school, and there was evidence of an implied contract of payment from quarter to quarter, and, the child having been sent away ill in the middle of a quarter, *indebitatus assumpsit* was brought as for the whole, *Park J.*, who delivered the judgment of the Court, said, "Here the former payments had been for and by the quarter. A new quarter had been begun; no intention, no declaration of any intention, to take away the child. She is not at last taken from school by the parent; but the child falling ill, the schoolmistress very properly sends

(a) 3 Car. & P. 349. (b) 3 A. & E. 179. (c) 2 C. & P. 370.

(d) 4 Camp. 375. S. C. 1 Stark. N. P. C. 198.

(e) 4 Camp. 376. (g) 5 Bing. 132.

her

her home. No intention is then manifested to put an end to the contract; no fault was attributable or attributed to the mistress, who would have continued her services, if they had been accepted; and, therefore, the jury were well warranted in coming to the conclusion they did. It seems, if authority were wanting, not very easy to distinguish the case of *Gandell v. Pontigny (a)*." In *Archard v. Hornor*,^(b) Lord Tenterden said that, on the common count for wages, the plaintiff could not recover for more than the time he had actually served; but there the precise terms of the contract were not proved; *Gandell v. Pontigny (a)* and *Collins v. Price (c)* were not cited; and it did not appear that the plaintiff had offered to continue his services if permitted. In *Hulle v. Heightman (d)* it was held that the plaintiff could not recover in indebitatus assumpsit for wages; but that case is distinguished from the present by the nature of the agreement, and the conduct of the parties; and the Court there held that the special contract was still unrescinded by the defendant. *Pagani v. Gandolfi (e)* was an action brought to recover salary; it was contended there that the action was premature, being brought within the year, at the end of which the salary would have been due; but Best C. J. said, "I think he" (the plaintiff) "was not bound to wait till the end of the year, if you dismissed him previously."

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Lord DENMAN C. J. I think this rule was granted for the purpose of bringing the case of *Gandell v. Pontigny* into question (a), and that there would have been

(a) 4 Camp. 375. S. C. 1 Stark. N. P. C. 198.

(b) 3 C. & P. 349.

(c) 5 Bing. 132.

(d) 2 East, 145.

(e) 2 C. & P. 370.

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no rule but for that case. The view taken by Lord *Ellenborough* of the point there decided was different from that which Lord *Tenterden* took of the same point in *Archard v. Hornor (a)*; and, if we were bound to decide between the two authorities, I should say that the later case is grounded on the better reason. There is obviously a great difference between suing for a breach of contract in dismissing the plaintiff, and for work and labour which, by reason of the dismissal, has not been performed. The defence in the last case would be the non-performance of the work; in the other, some excuse for breaking off the contract. But, here, no question arises on this point, for the action is brought too soon. The plaintiff sues during a period of time in which he might have returned to the service and completed it, or obtained a more beneficial employment in place of that withdrawn, so that he would have been benefited, and not hurt by the dismissal. The rule must be discharged.

PATTESON J. If it were necessary to choose between the two decisions, I should have no hesitation in preferring that of Lord *Tenterden* in *Archard v. Hornor (a)* to Lord *Ellenborough's* in *Gandell v. Pontigny (c)*. None of the other cases is inconsistent with *Archard v. Hornor (a)*. *Collins v. Price (c)* differed from the present case in its circumstances; there was one count on a special agreement, and it is not clear that the count on which the plaintiff recovered there was the indebtedness count. And there may be some little doubt as to

(a) 3 Car. & P. 349.

(b) 4 Camp. 375. S. C. 1 Stark. N. P. C. 198.

(c) 5 Bing. 132.

the

the correctness of the decision. But here the plaintiff was paid up to the 19th of *September*, and he commences an action as upon an executed contract, for wages which could only be due prospectively, to the end of the quarter. It would be ridiculous to say that a plaintiff could recover in such an action.

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WILLIAMS J. How can it be said that an action of *indebitatus assumpsit* can be maintained for services which might never have been performed? I should have no difficulty in saying, if I were called upon to decide that question, that the decision in *Archard v. Hornor* (a) has more reason and authority to support it than that in *Gandell v. Pontigny* (b).

COLERIDGE J. Assuming *Gandell v. Pontigny* (b) to be good law, the result is that, if the party dismissed was ready and willing to complete the term of service, the work not done during that term is as if it had been done. But, supposing that, under those circumstances, the party stood in the same situation as if the work had been done, he must still have waited till the end of the term before commencing his action. The very statement of the argument shews this. The correctness of the decision, therefore, in *Gandell v. Pontigny* (b) (though I am not satisfied with it) does not now come in question.

Rule discharged.

(a) 3 *Car. & P.* 349.

(b) 4 *Camp.* 375. *S. C.* 1 *Stark. N. P. C.* 198.

1837.

Monday,
November 20th.

The QUEEN against BLISS.

The question in a cause being, whether a particular road, admitted to exist, was public or private, evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was a tenant, saying, at the same time, that he planted it to shew where the boundary of the road was when he was a boy.

Held, that such declaration was not evidence, either as shewing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest.

INDICTMENT for obstructing a public highway. Plea, Not Guilty. On the trial before *Gaselee J.*, at the *Suffolk* Spring assizes, 1836, a principal question was, whether the way obstructed was public or private. A witness for the prosecution stated that one *Ramplin*, a publican, who was dead at the time of the trial, had planted a willow thirty years ago on a meadow of which he was tenant and occupier, and over which the way in question now ran. The counsel for the prosecution then asked "what *Ramplin* said, when he planted the willow, about his planting it?" The question was objected to, but admitted by the learned Judge, and the witness answered that *Ramplin* said he planted it to shew where the boundary of the road was when he was a boy. The willow had remained ever since. The jury found that the way was public, and a verdict was taken for the crown. In the ensuing term, a rule nisi was obtained for a new trial, on the ground that the above evidence ought not to have been admitted.

B. Andrews and *Byles* now shewed cause. First, *Ramplin's* statement was receivable as the declaration of a tenant against his own interest^(a). By admitting that a public road passed over the land he abridged his own rights in it. The acts of tenants in such cases have been held legitimate evidence, their interests being the same as those of the reversioners, though, in *Daniel v.*

(a) See *Doc dem. Daniel v. Coulthred*, antè, p. 235.

North (a) a distinction was drawn as to window-lights established, with the tenant's acquiescence, in opposite premises. *Le Blanc J.* said there, "It is true, that presumptions are sometimes made against the owners of land, during the possession and by the acquiescence of their tenants, as in the instances alluded to of rights of way and of common; but that happens, because the tenant suffers an immediate and palpable injury to his own possession, and therefore is presumed to be upon the alert to guard the rights of his landlord as well as his own, and to make common cause with him; but the same cannot be said of lights put out by the neighbours of the tenant, in which he may probably take no concern, as he may have no immediate interest at stake." [*Williams J.* If the lights in such a case would be a nuisance to the reversioner, it does not appear why they would not be so to the tenant. *Patteson J.* I should think the establishing of such lights would hurt his feelings as well as those of the landlord. Lord *Denman C. J.* And, on the other hand, the use of a path might be beneficial to the tenant during his term; as, for instance, if the tenant kept a public-house to which it led.] Secondly, the evidence offered was not mere evidence of reputation; the planting of the willow was an act done by the tenant, and his words were a declaration accompanying the act, and shewing his intention in doing it. The evidence on this point was not tradition of a particular fact, which has been held inadmissible, 1 *Phil. on Ev.* 258. part 1. c. 13. s. 2. (b); but, so far as it could be said to relate to a particular fact, it was proof of the thing done, with its accompanying circumstances, on

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(a) 11 *East*, 372.

(b) 8th ed. The 7th edition was cited in the argument.

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the oath of an eye and ear witness. Thirdly, if the evidence went no further than the statement of a deceased person that such a portion of land was the highway, it falls within the common rule as to evidence of reputation. [Lord *Denman* C. J. It is a question with me whether *Ramplin's* was a statement of reputation. He does not assert that he has heard old people say what was the public road; but he plants a tree, and asserts that the boundary of the road is at that point. It is the mere allegation of a fact by the individual. *Coleridge* J. In the usual course, it is first proved that there is a way running in a certain direction, and evidence is then given of its being public. Can the mere existence of a way be proved by reputation? The words ascribed to *Ramplin* do not amount to a statement that the road was public.] Whatever he said on the subject was evidence. It was as if he had been alive and stated it in Court. [*Patteson* J. In that case he might have been asked what repairs he had seen done upon it; but any thing that he might have said formerly on that subject would not be evidence after his death.] The evidence was at least admissible, whether it might ultimately be considered as shewing a public or only a private right: and the natural import of his expression, under all the circumstances, was that the road was public. [*Coleridge* J. You make the evidence admissible or not according to the interpretation which a jury might give the words. Can that ever be?] The Judge must decide when the evidence is offered, and desire the jury, in summing up, to give it weight or not, according to their construction of it. [Lord *Denman* C. J. Suppose *Ramplin* had said, "When I was a boy, a hedge ran in this direction, bounding the highway,"

way," that would have been more satisfactory than the evidence offered here; but would such proof be admissible?] It would; or even evidence of *Ramplin's* saying that he had heard so. The statement offered was, in truth, evidence on the question whether the road was public or private. It can be represented as evidence of a particular fact only by confining the effect of *Ramplin's* words to the spot where he planted the tree. But those words give a character to the whole surface over which the alleged road lies. If he said that the point at which the tree stood was public road, he clearly meant to say the same of any square yard forming part of the way in question.

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Kelly, contra, was stopped by the Court.

Lord DENMAN C. J. The question in this case was, whether the road obstructed was or was not a public highway. To prove that it was so, a witness was called whose statement was calculated to make a great impression on the jury. He had planted a willow, and, in doing so, said that he planted it to shew where the boundary of the road was when he was a boy. And it is inferred, from the circumstances, that he meant to speak of the road as having been public. I think the evidence was not admissible. It is not every declaration accompanying an act that is receivable in evidence: if it were so, persons would be enabled to dispose of the rights of others in the most unjust manner. The facts that *Ramplin* planted a willow on the spot, and that persons kept within the line pointed out by it, would have been evidence; but a declaration to shew that the party planted it with a particular motive is not

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so. Then, is the declaration evidence as made against the party's interest? If we held that it was, we should get rid of the authority of *Daniel v. North* (a), where it was held that a tenant cannot, merely by his own admission, bind the landlord. It is true that the landlord and tenant here may have had the same interest; but so they possibly may in any case: they *might* in *Daniel v. North* (a). Neither was the evidence admissible as shewing reputation. Any statement from a person since deceased is to be received with caution. Lord *Ellenborough*, in a leading case on this subject (b), allowed, with great reluctance, the admissibility of reputation as evidence. But here the deceased party is reported to have said that the boundary of the road was at a particular spot; that is, that he knew it to be so from what he had himself observed, and not from reputation. I think, therefore, that the rule ought to be absolute.

PATTESON J. In looking at this evidence as proof of reputation, we must consider what is the issue. If the question had been of boundary merely, the statement of the deceased person would have been receivable; but evidence of reputation as to boundary is not let in where the question is whether a road be public or private. If evidence of user had been offered, it would have been very different; and proof of declarations that the line of road in question had always been used as public would have been admissible. It was agreed here that the alleged road was a road of some sort; the evidence was not necessary as to that; and the reputation which it was attempted to introduce was of a particular fact.

(a) 11 *East*, 372. (b) Probably *Weeks v. Sparks*, 1 M. & S. 679.

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Then it was said that the declaration might be proved as accompanying an act; but whether it accompanied the act, as explanatory of it, is equivocal; and, at any rate, the declaration signified nothing in this case, the question being not of boundary, but as to the character of the road, whether public or private. The mere fact of the tree being placed there could not, I think, be relevant, unless as introductory to other matters. Then was the declaration of *Ramplin* admissible as contrary to his interest? He was only an occupier under some one else. To say that he could bind his landlord in the manner supposed, so as to give the public a right against him, would be overturning *Daniel v. North* (a), *Wood v. Veal* (b), and other authorities. If the long acquiescence of a tenant cannot bind the landlord, his declaration can neither bind him, nor be evidence at all against his right.

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WILLIAMS J. There is no doubt that evidence of reputation is admissible where the question to which it applies is merely whether the road be public or not. In *Ireland v. Powell* (c), the question being whether a turnpike stood within the limits of a town, *Chambre J.* admitted evidence of reputation that the town extended to a certain point, and allowed it to be proved that old people, since dead, had declared that to be the boundary, but not that those people had said that there formerly were houses where none any longer stood; observing that that was evidence of a particular fact, and not of reputation. The statement offered in evidence here is very like the declarations so rejected. It is not reputation,

(a) 11 *East*, 372.(b) 5 *B. & Ald.* 454.(c) *Peake on Evidence*, 16. 5th ed.

1837. in the proper sense. Declarations accompanying acts are a wide field of evidence, and to be carefully watched. The declaration here had no connection with the act done; and the doing of the act cannot make such a declaration evidence.

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COLERIDGE J. It is a rule that evidence of reputation must be confined to general matters, and not touch particular facts. To try whether the declaration here was admissible according to that rule, let it be severed from the fact of planting which took place at the same time. Then it stands that *Ramplin* said he planted the tree for a certain purpose; namely, to shew the boundary. That is a particular fact; and evidence given of it is like proof of old persons having been heard to say that a stone was put down at a certain spot, or that boys were whipped, or cakes distributed, at a particular place, as the boundary; which statements would not be admissible.

Rule absolute.

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FILLIEUL *against* ARMSTRONG.Tuesday,
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ASSUMPSIT. The first count of the declaration stated that, whereas heretofore, to wit 24th June 1835, in consideration that plaintiff, at the special instance &c. of defendant, would enter into his employ in the capacity of a teacher of the *French* language and drawing, in a school of defendant, for one whole year then next following, at and for a certain salary or wages, to wit at the rate of 60*l.* per annum, together with the board and lodging of plaintiff, defendant undertook, &c., to retain and employ plaintiff for and during the time aforesaid, in the capacity aforesaid, at and for the salary or wages and on the terms aforesaid; and, although plaintiff, confiding &c., did afterwards, to wit &c., enter into defendant's employ in the ca-

Declaration in assumpsit stated that, in consideration that plaintiff, at defendant's request, would enter into his employ as teacher of *French* and drawing in defendant's school for a year, at a yearly salary, defendant undertook, &c., to retain and employ plaintiff for the time aforesaid in that capacity and on those terms: that plaintiff entered into the

employ, and was willing to remain &c., but defendant, during the term, without notice or reasonable cause, discharged plaintiff, and refused to pay him from that time. Plea, that, when defendant retained plaintiff, and defendant made the promise, as in the declaration mentioned, plaintiff, in consideration of the premises, promised well &c. to serve him in the said capacity, and not to absent himself except during vacations appointed by plaintiff: that defendant retained plaintiff, as in the declaration mentioned, on the faith and in consideration of such promise, and was always ready to continue &c. until plaintiff's misconduct after-mentioned: that defendant appointed a vacation, to cease on a certain day, when plaintiff was to return to the school and resume his duties; that, on that day, the pupils returned, and the school recommenced, as plaintiff knew; that plaintiff did not return to the school and resume his duties, but wrongfully absented himself for a long and unreasonable period, without reasonable cause or defendant's consent; whereby defendant was delayed and injured in respect of divers matters and businesses in which he would have employed plaintiff in his said situation and capacity during that period, and was forced to endeavour to procure another person to serve him in that capacity instead of plaintiff; whereupon it became lawful and necessary for him to discharge plaintiff; wherefore &c. Plaintiff having pleaded over, and defendant having obtained a verdict, Held,

1. That the plea neither shewed that the contract was put an end to, nor that defendant had a right to dissolve it.

2. That it sufficiently confessed the declaration, and that plaintiff therefore was entitled to judgment non obstante veredicto.

3. Per *Patteson J.*, that, if the plea had not confessed the declaration, a repleader must have been awarded, and that the Court for that purpose would have remoulded the rule nisi obtained for judgment non obstante veredicto.

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capacity &c., and did duly and faithfully perform and execute the duties by him to be performed in the capacity aforesaid for a long space &c., viz. until 3d of *February* 1836, and although plaintiff was on the day and year last aforesaid, and hath always been, ready and willing, and then offered, to remain and continue in defendant's employ, in the capacity &c., for the remainder of the said year, yet defendant did not nor would continue plaintiff in his employ until the expiration of the said year; but, on the contrary thereof, during the said term of one year, viz. on 3d *February* 1836, without any reasonable notice, wrongfully refused to suffer plaintiff to continue in his employ, and wrongfully discharged him therefrom, without any reasonable or probable cause whatsoever, and hath thence hitherto wholly neglected and refused to retain or continue plaintiff in his employ for the remainder of the said term; by means whereof plaintiff hath lost all the wages, &c., which he otherwise would have derived from being continued in the employ, &c., and which defendant hath from that time wholly refused to pay or allow to plaintiff; and plaintiff hath been, and is, by means of the premises, wholly unemployed. There was a second count.

Second plea to the first count. That, before and at the time when defendant retained plaintiff as in the first count mentioned, and when defendant made the promise in that count mentioned, plaintiff, in consideration of the premises therein mentioned in that behalf, promised defendant well and diligently and faithfully to serve defendant in the capacity of teacher at defendant's school, and not to absent himself therefrom without just and sufficient cause, except during the times appointed by

by plaintiff for vacations at the school; and defendant retained plaintiff, as therein mentioned, upon the faith and in consideration of plaintiff's said promise: that defendant was always ready and willing to continue to retain and employ plaintiff in the capacity aforesaid, for the period and on the terms in the first count mentioned, until plaintiff misconducted himself as aftermentioned: that, after the making of the promise in the first count mentioned, and before plaintiff was dismissed, viz. 23d *December* 1835, a vacation was appointed by plaintiff for the school, viz. from 24th *December* 1835 until and upon 29th *January* 1836; and it was then appointed by plaintiff that the vacation should cease, viz. on 29th *January* 1836, and that, on a certain day, viz. 30th *January* 1836, the school should recommence, and plaintiff as such teacher should return to the school and resume his duties as such teacher; of all which &c. (notice to plaintiff): that plaintiff was absent from the school during the period appointed for the vacation; and that it became and was his duty, as such teacher, to return to the school and resume his duties, as such teacher as aforesaid, when the vacation ceased, viz. on 30th *January* 1836; and, although divers of the pupils of defendant returned to the school on the said 30th *January* 1836, and the school then recommenced, as plaintiff well knew, yet plaintiff, not regarding &c., did not nor would return to the school, or resume his duties as such teacher, on the day so appointed for that purpose; and, on the contrary thereof, plaintiff wrongfully absented himself from defendant's said service, and neglected to return to the school and to resume his said duties on the day so appointed, viz. on 30th *January* 1836, and for a long and unreasonable period,
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viz. on that day and for the space of divers, to wit two, days from the day and year last aforesaid, without any just, sufficient, or reasonable cause or excuse for such absence, and without the consent and against the will of defendant; and thereby defendant was greatly delayed and injured in respect of divers matters and businesses in which he would otherwise have employed plaintiff in his said situation and capacity during the last-mentioned time, and was forced to endeavour to procure another person to serve him in the capacity aforesaid, and in place and stead of plaintiff; and thereupon it became and was lawful and necessary and expedient for defendant to discharge and dismiss plaintiff from his said service and employ as such teacher as aforesaid; wherefore defendant afterwards, viz. at the said time when &c., in the first count mentioned, did refuse to suffer plaintiff to continue in his said employ in the capacity aforesaid, and then discharged him therefrom, being the supposed breach &c.

Replication. That, after the absence of plaintiff, and before defendant discharged him, plaintiff returned to the performance of his duties in such service and employ of defendant, as in the said first count mentioned, and defendant retained and employed him in such service and employ under the said agreement in the said declaration mentioned; and plaintiff afterwards remained and continued in such service and employ under the said agreement, and on the terms in the said first count mentioned, for a long space of time then next following, viz. until 3d *February* 1836, when defendant wrongfully discharged plaintiff from his said service and employ.

Verification.

Rejoinder. That, after the said absence of plaintiff
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in the second plea mentioned, and before defendant discharged plaintiff from his said employment, as in the said second plea and in the said first count &c. mentioned, plaintiff did not return to the performance of his duties &c.; and defendant did not retain &c.; and the said plaintiff did not afterwards remain &c., in manner and form &c. Conclusion to the country. Other issues of fact were joined.

On the trial before Lord *Denman* C. J., at the *Middlesex* sittings after *Easter* term 1836, a verdict was found for the defendant on this issue. In *Trinity* term 1836, *Cresswell*, for the plaintiff, obtained a rule nisi for judgment non obstante veredicto, or for a new trial.

Gurney now shewed cause. As to the motion non obstante veredicto (a), the record contains a sufficient justification of the dismissal. It will not be denied that a master may dismiss a servant for improper conduct: the question here is, whether the plea shews an impropriety of sufficient importance. The plaintiff complains that the defendant refused to retain him: the answer is, that he chose to absent himself; in effect, that he himself put an end to the contract. If such an absence as this be not a ground of dismissal, may an usher absent himself for a month, or a year? The master is compelled to insist upon dismissing as soon as the usher absents himself, for he must lose no time in engaging another to supply his place. In *Winstone v. Linn* (b) it was held that a master was not released from the covenant in an apprentice deed by the tem-

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(a) This was the only question discussed on the present argument. See the end of the case.

(b) 1 B. & C. 460.

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porary absence of the apprentice: but there both *Bayley* and *Holroyd* Js. distinguished the case from that of master and servant, pointing out that a premium was received for taking an apprentice, and admitting that, in the ordinary case of hired service, the non-performance of the service was a good ground of dismissal. And, even in the case of the apprentice, judgment was given, as appears by the language of *Bayley* J., on the ground that the defendant had not rejoined that an unreasonable time had elapsed before the apprentice offered to return. Here there is such an averment: so that, if there can, under any circumstances, be such an absence as is unreasonable on the part of an usher, the defendant must have judgment.

Cresswell and *W. H. Watson*, *contrà*. There may be some difficulty as to the form of the rule; for it does not seem quite clear what the effect of the plea is. It does not offer a traverse; yet it assumes to vary the contract in the declaration, by adding new terms. [*Patteson* J. If the plea contain no confession, there must be a repleader.] If so, the rule might be moulded. That was done in *Phummer v. Lee* (a). But there does appear to be a confession; for it may be contended that the term added is merely what the law would imply from the contract stated in the declaration, and that then the plea negatives the performance of the defendant's duty so implied. As to the general question, the plea shews no absence sufficient to justify the dismissal: it merely states an absence for a long and unreasonable time, to wit two days. That may shew a breach of contract by

(a) 2 M. & W. 495.

the plaintiff; but such a breach does not authorise a dissolution of the engagement. It is not the case of a menial servant: and, even there, every breach of duty does not warrant a dismissal. The fault must involve either moral misconduct, wilful disobedience, or habitual neglect; *Callo v. Brouncker* (a). In *Atkin v. Acton* (b) the party discharged was guilty of an immoral and indecent act which made it impossible for the master to allow him to be in the house. In *Ridgway v. The Hungerford Market Company* (c) there was an act incompatible with the relation of the parties. *Freeman v. Taylor* (d) shews that one of two contracting parties cannot put an end to the contract on the ground of a breach by the other party, unless such breach go to the root of the contract. It is said that the defendant was compelled to engage a new usher; but that assumes the fact of the dissolution of the contract. (*Watson* was then stopped by the Court.)

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LORD DENMAN C. J. I think the declaration is sufficiently confessed, although the defendant professes to add more terms to the contract. Then the question is, whether the defendant had a right to dismiss the plaintiff for any cause which he alleges. Now the defendant does not say that the plaintiff has been guilty of any immorality, nor does he shew that he was really obliged to hire another person, or that the plaintiff's department was not in fact adequately filled. He says, indeed, that he was delayed and injured in respect of matters and businesses in which he would have employed the plaintiff during the time; but he does not

(a) 4 C. & P. 518.

(b) 4 C. & P. 208.

(c) 3 A. & E. 171.

(d) 8 Bing. 124.

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say that the instructions in *French* or drawing were impeded, or that the business of the school was suspended for a single hour. Although, therefore, the defendant might possibly be entitled to sue the plaintiff for absenting himself, the record shews nothing which puts an end to the contract.

PATTESON J. I am of the same opinion. If the plea did not confess the declaration, it is clear that the rule might be moulded, and the Court might order a repleader. But I think there is a confession. For the defendant says that, when he retained the plaintiff *as in the first count mentioned*, and when he made *the promise in that count mentioned*, certain other things took place. Then, next, from the contract stated in the declaration, and from the plea, it does not appear that the defendant had any power to put an end to the contract upon the plaintiff absenting himself, or that the contract thereupon became void. The assertion in the plea is, in effect, that the defendant put an end to the contract, not that the contract became void of itself. Now, even taking the case as between master and servant, the facts did not entitle the defendant to put an end to the contract. No moral misconduct is shewn, nor any failure on the defendant's part amounting to a dissolution of the engagement. The rule therefore must be made absolute for judgment non obstante veredicto.

WILLIAMS and COLERIDGE Js. concurred.

A discussion afterwards arose respecting the finding of the jury upon the other issues; and finally the Court, on the last day of term (*November 25th*), made the rule absolute for a new trial.

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ARKWRIGHT *against* CANTRELL.Tuesday,
November 21st.

DEBT. The declaration stated that, whereas our sovereign lord the now King, long before and at the time of the committing of the grievance by the defendant hereinafter mentioned, and before and at the time of the holding of the Barmote Court hereinafter mentioned, was, and from thence hitherto hath been and still is, lord of the *King's Field* in the soke and wapentake of *Wirksworth* in the county of *Derby*; and he and all those whose estate he hath and had of and in the said lordship of the *King's Field* with the appurtenances, from time whereof &c., have had and held, and have been accustomed to have and hold, and of right ought &c., and still of right ought &c., within the soke and wapentake aforesaid, a certain customary court, viz. the Great Barmote Court, held before his and their steward for the time being, or his deputy, every year twice in the year, that is to say &c. (naming the times), amongst other things to determine questions

By the custom of a lordship in a lead-mining district, there was an officer called a barmaster, appointed by the lord to see that the duties of lot and cope, &c., were properly accounted for to the lord; to be indifferent and to do justice between miner and miner, and miner and adventurer, and the miner and the lord; to apportion veins of ore newly discovered between the discoverer and other adventurers, and the lord; to enforce proper working of the veins; to keep a dish by which all

the ore was to be measured; to punish small depredations, and to collect fines. In case of certain defaults, he was himself liable to fines, payable to the lord of the field or his farmer. Certain disputes within the lordship were tried at a customary court called the Barmote Court, before the deputy stewards and a jury who were summoned by the barmaster, or his deputy, on precept from the deputy steward. The summoning officer selected them at his discretion.

The lord granted, by indenture, to *A.* for years, in consideration of a certain fine and rent, all the mines in the district, with the duties of lot and cope, and also, for the same term, the office called the barmastership, with all profits, &c., thereto belonging, at a rent, with a proviso for re-entry, if the grantee should make a deputation of the office without license, or without having such deputation enrolled.

Held, that the grant, as to the barmastership, was void, because the grantee took an interest, as lessee or farmer, incompatible with the duties of barmaster.

That the grant was not void as giving incompatible offices, the lease not conferring an office.

And that, on an issue whether or not *A.* was barmaster at a certain time, the verdict, on the above facts, ought to be entered in the negative.

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arising within the said lordship of and concerning the mines, groves, shafts, or mears of ground within the said lordship, according to the customs of the said lordship, as belonging and appertaining to the said lordship; and that, at the said Barmote Courts, so held at the times aforesaid, a jury of twenty-four honest and able men, duly summoned and sworn according to the customs of the said lordship, during all the time whereof &c., have enquired, and have been used and accustomed to enquire, of, at such court, such matters and things as have happened within the said lordship which belonged to the said court to determine, concerning the mines, groves, shafts, or mears of ground within the said lordship, and have been used and accustomed, during all the time aforesaid, to make such orders and awards touching such matters and things as should be reasonable, according to the custom of the said lordship; and that within the said lordship there now is, and from time whereof &c. there hath been, a certain ancient and laudable custom of the said lordship, there used and approved of, for determining questions arising within the said lordship, of and concerning the mines, groves, shafts, or mears of ground within the said lordship; viz. that, if any miner or other person do keep lawful possession of any grove, shaft, or mear of ground within the said lordship, according to the custom of the said lordship, and if any other person or persons, by day or by night, cast in or fill up such grove, shaft, or mear of ground, however the same shall be wrought, every such person so offending therein shall forfeit for such offence 10*l.*, the one-half to the lord of the field or farmer, and the other half to the barmaster or steward, and shall pay the party

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so much as will make good the work again : The count then stated that heretofore, viz. on *March* 20th, 1834, one *Job Bunting*, then being a miner of and in certain mines within the said lordship and jurisdiction of the said Court, did keep lawful possession, according to the custom of the said lordship, of a certain shaft at a certain mine within the lordship aforesaid and jurisdiction of the said Court, and thereupon, whilst the said *J. B.* so kept &c., the defendant wilfully, unlawfully, maliciously, and against the will of the said *J. B.*, and contrary to the customs of the said lordship and the laws of this realm, cast in and filled up the said shaft, to the great injury of the said shaft and mine, and damage of the said *J. B.*, viz. to the injury of the said shaft and damage of the said *J. B.* of 20*l.*, within the lordship and jurisdiction aforesaid, and to the injury of the rights of others the miners within the lordship and jurisdiction aforesaid; and that afterwards, viz. *April* 7th, 1834, at a great Barmote Court of the lordship aforesaid, duly held at the *Moot Hall* in *Wirksworth* aforesaid, within the said lordship and jurisdiction, within &c. (one of the periods for holding courts), viz. &c., before *William Eaton Mousley*, then and still being the deputy to one *Charles Clarke*, then and still being steward of our said lord the King of the said court of the said lordship, upon the oaths of &c. (naming twenty-four), honest, able, and lawful men, duly summoned, sworn, and charged, according to the custom of the said lordship, to enquire of, order, and award all such things as belonged to the said jury to enquire of, order and award, the said jury at the said Court so held as aforesaid, on the day and year last aforesaid, duly enquired of and concerning the casting in and

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filling up of the said shaft by the said defendant as aforesaid, and thereupon the said jury did order and say that the said defendant should, amongst other things, pay the sum of 10*l.*, the one half to the lord of the field or farmer, and the other half to the barmaster or steward, according to the custom in that behalf: averment, that, at the time of the committing of the said grievance by the defendant, and at the time of the holding of the court, and of the making of the said order for the payment of the said sum of money, and from thence hitherto, the plaintiff was, and from thence hitherto hath been, and still is, the barmaster: whereby an action hath accrued to the plaintiff, as such barmaster as aforesaid, to demand and have of and from the defendant the sum of 5*l.*, being one half of the said sum of 10*l.* so ordered to be paid by the defendant as aforesaid, and being the said sum of 5*l.* above demanded: yet the said defendant has not paid &c.

There were several pleas; the sixth, which is the only one requiring particular mention, was: — That the plaintiff was not, at the time of the holding of the Court, and of the making of the order for payment of the said sum of money as in the declaration alleged, the barmaster of the said Court in manner and form &c. Conclusion to the country. Issue thereon.

On the trial before Lord Abinger C. B., at the *Derbyshire* Spring assizes, 1836, the plaintiff, in support of his case on the above issue, put in an indenture of lease under the seal of the Duchy of Lancaster, dated November 17th, 1827, from the King to *Richard Arkwright*, the plaintiff, whereby, after certain recitals, his Majesty, in consideration that *R. A.* had surrendered a former grant,

grant, dated in 1803, and had paid 5750*l.* by way of fine, and for other considerations, did grant and demise to *R. A.* all those mines of lead, with their appurtenances, within the soke and wapentake of *Wirksworth*, with the duties of lead ore called the lot and cope within the said soke and wapentake, parcel of his Majesty's Duchy of *Lancaster* in the said county of *Derby*, habendum to *R. A.*, his executors, administrators, and assigns, from *March* 25th then last past for thirty-one years thence next ensuing, at a yearly rent of 226*l.* for the first seven years, and 296*l.* for the residue of the term; and his Majesty did also, for the considerations aforesaid, "grant and demise unto the said *Richard Arkwright* all that the office called the bearmastership, otherwise the barmastership, otherwise" &c., "within the soke and wapentake of *Wirksworth* aforesaid in the said county of *Derby*, parcel of the possessions of the said Duchy of *Lancaster*, with all profits, commodities, and advantages to the said office belonging, or in anywise incident or appertaining: to have and to hold the said office called &c., "and all and singular other the premises hereby last granted and demised or mentioned or intended so to be, with their and every of their appurtenances, and every part and parcel thereof, unto the said *Richard Arkwright*, his executors, administrators, and assigns, from the said 25th day of *March* last past, for and during and until the full end and term of thirty-one years from thence next ensuing," &c., "yielding and paying therefore in every year, during the said term of thirty-one years hereby thereof granted, unto the King's Majesty, his heirs and successors, the rent or sum of 4*l.*," &c.; and *Arkwright*, for himself, his heirs and assigns, covenanted to pay the several rents, and to

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1837. account for profits arising or received by him under these presents. Proviso for re-entry on the premises demised in case of breaches of covenant, or if the executors, administrators, or assigns of *R. A.* "shall assign or transfer the premises hereby demised, or any part thereof respectively, unto any person or persons whatsoever, without licence under the seal of the said Duchy for that purpose first had and obtained, or grant any deputation or appointment of the office of barmaster for the said soke or wapentake, or for any of the liberties within the same, without the licence and approbation of the Chancellor or Vice-Chancellor of the said Duchy for the time being by writing under their hands for that purpose first had and obtained; or in case the said *R. A.*, his executors, administrators, or assigns shall neglect or refuse to cause these presents, and every such assignment, deputation, or appointment which shall or may at any time or times hereafter be made of these presents, or of the premises hereby demised, or any part thereof, or of the said office of barmaster, with any such licence as aforesaid, to be inrolled before the auditor of the said Duchy for the time being, or his deputy, within six months next ensuing the respective dates thereof, and also, within the time aforesaid, to cause every such assignment, deputation, or appointment as aforesaid to be docketted, or a minute thereof entered in the office of the clerk of the council of the said Duchy for the time being, containing the dates of, and parties' names to, every such assignment, deputation, or appointment respectively, and a description of the premises assigned, and the purport of such deputation and appointment."

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The following evidence was given as to the barmaster's

ter's duties, by the deputy steward : — " The duties of the barmaster are to see that the ore is properly measured, and the duties properly accounted for to the Crown, and to do justice between miner and miner, and miner and adventurer, and between the miner and the lord, and to see that the customs are properly observed. If there should be any dispute between the lessees of the Crown and the miner as to the proper quantity, I apprehend the twenty-four" (jurymen) "are to decide."

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A book was also referred to as authority on this subject, by consent of parties at the trial, called "*The Miner's Guide, or Complete Miner*," by *William Hardy*, 2d edition, published at *Birmingham* in 1762, containing, among other things, "The articles and customs for the High Peak Hundred, in the King's Field, in *Derbyshire*." Immediately under that title were the following paragraphs : —

" *Wirksworth* wapentake.

" At the great Court-Barmote, for the lead mines held at *Wirksworth*, for the soke and wapentake of *Wirksworth*, in the county of *Derby*, the 10th of *October*, in the year of our Lord 1665.

" The inquisition of the late great inquest, taken upon oaths of" &c. (names of twenty-four jurors).

" Article I.

" We say, upon our oath, That by the ancient custom of the mines, within the soke and wapentake of *Wirksworth*, the miners and merchants at first chose themselves an officer called a barmaster, to be an indifferent person betwixt the lord of the field or farmer and the miners and betwixt the miners and merchants ;

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which barmaster, upon finding any new rake or vein, did, upon notice given by the miner, deliver to the first finder two meares of ground in the same vein, each meare in a rake or pipe work containing twenty-nine yards in length, and in a flat work fourteen yards square; the which two meares of ground the miner is to have, one for his diligence in finding the vein, and the other for mineral right; paying the harmaster, or his deputy, one dish of his first ore therein gotten: And then the barmaster or his deputy is to deliver to the lord of the field or farmer one meare of ground in a new vein, at either end of the aforesaid two meares half a meare of ground, and then every one, in such rake or vein, one meare or more, according to their taking.

“ Observation on Article 1.

“ The barmasters were first chosen by the miners and merchants, but are since chosen by his Majesty’s farmers of the mineral duties; and all other barmasters are chosen by the lords, or their farmers of the mineral duties, in all mineral fields in the county of *Derby*, where barmasters act, and are removable at the direction of those who put them into office. The branches of a barmaster’s office, according to the oath he acts under, are many.”

Then followed other articles (referred to in the present argument), the substance of which was as follows: — Art. 2. We say, if any miner or other set on any old work, the barmaster or his deputy is to deliver him but one meare of ground, for which he is pay one dish of his first ore therein gotten, and the lord or farmer to have no half meare. Art. 9. The barmaster or his deputy ought

ought to walk the mines once a week at least, and where he sees a meare of ground, which, to his knowledge, is lawfully possessed, to stand unwrought three weeks together, and might be wrought, not being hindered by water, &c., then, if he can conveniently, he should give notice to the parties neglecting; and, (after certain other proceedings which are pointed out, then) in case of continued neglect, the barmaster or his deputy may lawfully set another man to work on such meare. The barmaster, if he neglect his duty herein, shall forfeit 5s. to the lord of the field or farmer. Art. 17. No person ought to keep any counterfeit dish or measure for ore, but every one to buy and sell by the barmaster's lawful dish, and no other be used or had; every buyer offending herein to forfeit 40s. to the lord or farmer, and the sellers to forfeit their ore, &c. Art. 18. Provision for measuring the ore of poor miners, if the barmaster or deputy neglect after warning. Art. 19. The barmaster or his deputy shall see that measure be indifferently made between the buyer and seller; and the buyer not to touch the dish, &c., on pain to forfeit 10s. Art. 20. After the ore is measured, the merchant, buyer, or miner carrying it away doth pay to the lord or farmer cope, being 6d. for every load of ore, nine dishes to the load, for which cope the miners, &c., have liberty to carry away the ore, and dispose of it to whom they please, without disturbance, &c. Art. 48. Power to the barmaster to punish (in the stocks or otherwise) persons feloniously taking away ore or other materials from any groove, shaft, &c., if below a certain value. Art. 53. That the barmaster, or his deputy, or the steward, ought to levy and collect all fines and forfeitures due by the custom of the mine; and, where any person is not able or willing to discharge the forfeiture

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or fine, then the barmaster or his deputy shall (for every such offence) punish such person in the stocks, &c.; but, in case the barmaster or his deputy, or the steward, do not henceforth levy and collect all fines and forfeitures due by the custom of the mine, nor punish such offenders in the stocks as are fit to be punished, they shall forfeit for every such neglect 5s. to the lord of the field or farmer.

The Great Barmote court of the soke and wapentake of *Wirksworth* was holden, as mentioned in the declaration, before the deputy steward of the said court, in the usual manner, on the *Monday* before *Easter*, 1834, the plaintiff being then, as he alleged in this cause, the barmaster. The deputy steward, when about to hold a Court, issues a precept to one of the deputy barmasters, of whom there were five at the time in question, to give notice of holding a Court; and such deputy barmaster directs a jury of twenty-four miners to attend. By the custom, if twenty-four do not attend, the deficiency may be supplied *de circumstantibus*. The principal deputy barmaster of the *Wirksworth* district gave evidence on the present trial, as follows. "The barmaster appoints me, and I am sworn in by the steward. I received directions from Mr. *Mousley*" (the deputy steward) "to summon the jury of the Barmote, in *April* 1834. The jury are not summoned, but I give verbal notice to such persons as I think to be most intelligent in mining matters. I have been deputy since 1831, but have assisted my father for twenty-five years. I sign myself barmaster in my books; the others are called deputies; they are not appointed by me, neither do they act under my authority, but under the authority of the lessee of the Crown."

On the above evidence it was contended, on the defendant's

fendant's part, first, that the grant of *November* 1827 did not convey the barmastership, but only the right of appointing to that office; secondly, that, if it conveyed the barmastership, the grant was void, as making the officer judge in matters affecting his own interest as lessee. The Lord Chief Baron reserved leave to move to enter a nonsuit or a verdict for the defendant. A verdict having been found for the plaintiff, *Hill*, in the ensuing term, moved according to the leave reserved; and a rule nisi was granted.

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Sir *J. Campbell*, Attorney-General, *Balguy*, and *Clarke*, now shewed cause. The deed of 1827 is a lease of the mines with the duties of lot and cope, and a grant of the office of barmaster. There is no analogy between such grant and the sale of an advowson or right of appointing; the office itself is granted in terms. The right to appoint a deputy implies that the party has the office in himself. It is contended that the office of barmaster is void, because incompatible with the rights conferred by the lease, which are also put on the footing of an office. But, if that were so, they, and not the barmastership, would be void, because, where incompatible offices are granted, the first becomes null, *Com. Dig. Officer*, (B 6.): note [22] to *Rex v. Godwin* (a); and it is necessary for carrying on the affairs of the district that there should be a barmaster, but not that the lot and cope should be leased. The grants, however, are not incompatible. The barmaster sees that there is a proper render of duties to the Crown; there he acts, not judicially, but as a mere agent. He

(a) 1 Doug. 398. It is said there that, where incompatible offices are taken, the acceptance of the *higher* vacates the other.

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does not settle disputes between the Crown and the miner : those, if they arise, are determined by a jury. [*Coleridge J.* He summons whom he pleases on the jury.] In that he acts ministerially : he decides nothing. The deputy steward presides in the Barmote Court ; and, if the jury were not impartially returned, there can be no doubt (though it was not expressly stated in evidence) that he would dismiss them and issue a new precept. [*Lord Denman C. J.* If that were so, who would summon the new jury ? *Coleridge J.* The same barmaster would summon the next jury.] But, further, the barmaster does not act by his own hand ; he appoints deputies, as the King deposes judicial officers to act between him and his subjects, and as the lord of a manor appoints a steward. [*Lord Denman C. J.* If there is an objection to the barmaster's exercising the functions of his office, is there any authority for saying that he can remove it by appointing a deputy ? *Coleridge J.* There is no express provision for his making a deputy : the grant only states what shall be done *if* he makes a deputy without licence]. It is in the nature of his office that he should appoint one ; and, if he has power, and ought, to do so, it is to be supposed he will. In fact, there has always been such an appointment. [*Patterson J.* Nothing in the grant obliges him to make it]. If he is interested, and therefore cannot properly exercise the office himself, he must appoint a deputy.

Hill, contra. The union of the barmastership with the interest of lessee is not shewn to be immemorial ; the evidence, at any rate, traces it only as far as 1803, the date of the grant recited in that of 1827. The plaintiff was not legally barmaster ; he had, at most, but the power of making a deputy. If the subject of grant
was

was the office itself, then, as it concerns the administration of justice, it was, by stat. 5 & 6 *Ed. 6. c. 16. s. 2.*, not saleable. [*Coleridge J.* If the office of deputy barmaster was judicial, could the Crown grant a power of appointing to it for years? Lord *Denman C. J.* cited *Sir George Reynel's Case (a)*]. The argument against a junction of the barmastership with the interest of a lessee is strengthened by the book of articles and customs for the *High Peak* hundred, referred to, by consent of both parties, on the trial. The duties there prescribed require an impartial dealing by the barmaster between the miner and the farmer. But this requisite cannot be properly fulfilled where the barmaster is himself the farmer. [Here he referred to the articles and observation cited, *antè*, pp. 571-4. He was then stopped by the Court.]

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LORD DENMAN C. J. I think it is clear that the two subjects of grant are incompatible. The office of barmaster is an office of trust and confidence, in which there are personal duties to be performed independent of a jury. The objection arising from that circumstance is, in my opinion, incapable of being cured by the barmaster's appointment of a deputy to do that which he is unable to perform himself. This is clear from the articles which Mr. *Hill* has read. The barmaster is to do acts of measuring, and to perform various duties between the merchant and miner, and the farmer: but the lease gives him the produce of the mines as farmer, while it also appoints him barmaster. An office may, indeed, continue full, though the party be appointed to another incompatible office; and on this ground it might be contended here, that the verdict was rightly found

(a) 9 *Rep.* 96 b.

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for the plaintiff. But the office of barmaster in the present case was void, because the plaintiff, when he accepted it, became also, as lessee, directly interested in violating that confidence, the maintaining of which is essential to a discharge of the barmaster's duties.

PATTESON J. When we see the duties which are to be performed by the barmaster, according to the articles referred to, it is quite clear that the plaintiff could not discharge them, being also farmer; and therefore that, being farmer, he could not be appointed barmaster. I do not say that his acceptance of that office vacated the other part of the grant, because the lease of mines was not an office: and, besides, it does not always follow, when a party holding an office accepts one incompatible with it, that the first is therefore vacant. Thus, in *Rex v. Patteson (a)*, it was held that an alderman, justice of the peace, accepting the office of treasurer to the county of the city of which he was justice, did not thereby vacate his former office, because for that purpose there should have been an amotion, or a resignation accepted; and this, although it was agreed that the offices of justice and of treasurer were incompatible. But the situation of a farmer renders it impossible that he should discharge the duties of a barmaster. By the articles cited, the barmaster should be a person indifferent between the miner and the farmer; the farmer himself cannot be so. Then it is said that he may act by deputy; but it is the first time I have heard that the incompatibility of offices can be got rid of by appointing a deputy for one, especially where it is not obligatory on the party to appoint. It is a novel argument, that a person who, at the time

(a) 4 B. & Ad. 9.

of appointment, cannot himself execute the office may cure the defect by making a deputy. The grant, however, merely contains a certain provision, *if* the grantee shall appoint a deputy without licence and enrolment. By the articles referred to, the barmaster or his deputy is, in several instances, made answerable to the farmer. Could the deputy barmaster account with his principal as farmer? The interests which the same party would have as barmaster and as farmer are so inconsistent that, supposing a deputy appointed, the offices are still incompatible.

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WILLIAMS J. The doctrine as to acceptance of inconsistent offices does not apply, because the taking of lot and cope is a benefit only, not an office. But the party having that benefit would, as barmaster, be called upon to perform conflicting and inconsistent duties, and is therefore incapable of holding the office.

COLERIDGE J. The interest which the plaintiff takes as lessee makes him incompetent to the office of barmaster. That is the ground on which I rest my judgment. The barmaster would have to decide upon conflicting interests of the miner and the lord of the field; and the deputy would be as the barmaster, and the lessee as the lord. The barmaster is appointed by the lord, and has to appoint the jury who are to decide disputes between miners and the lord or farmer. No difficulty arises here from any evidence of long custom; and, even if that had been proved, the custom would not be maintainable. In *Wood v. Lovatt (a)*, where the plaintiff had been amerced in the

(a) 6 T. R. 511.

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court leet for a private injury to the lord, and a custom was pleaded for presenting and amercing at the leet for injuries to the lord, it was held that, where the injury was private, the custom was no justification. It was indeed decided, in *Rex v. Joliffe* (a), that a custom for the steward to nominate the jury to serve on the court leet was good; but that decision was grounded on the particular nature of courts leet. On the principle of *Wood v. Loveatt* (b), I think that, where the lord's private interest is concerned, he cannot authorise a person, who represents himself, to decide between himself and others in matters affecting that interest. This is not the case of a party holding two incompatible offices, or of an office sold contrary to stat. 5 & 6 Ed. 6. c. 16.: the party here is disqualified by the interest which he takes under the lord. The rule must therefore be absolute.

Rule absolute to enter a verdict for the
defendant on the issue upon the sixth
plea.

(a) 2 B. & C. 54.

(b) 6 T. R. 511.

Wednesday,
November 22d.

DOBLE against CUMMINS.

Goods, being
seized by the
sheriff under a
fi. fa., were
claimed ad-
versely to the
execution cre-
ditor. On an
interpleader
rule obtained

by the sheriff under stat. 1 & 2 W. 4. c. 58. s. 6., the claimant and the sheriff appeared, but not the execution creditor. The claimant supported his title by affidavit.

The Court refused to order generally that the execution creditor should be barred of his demand; but made a rule that the sheriff should withdraw from possession, and the execution creditor take no proceedings against him in respect of the goods now claimed.

sheriff

sheriff communicated this notice to the plaintiff, and requested him to indemnify the sheriff, or allow possession to be withdrawn; he also required of *Perkins's* attorney an indemnity for withdrawing. Both parties refused to interfere. The sheriff thereupon obtained a rule calling upon the plaintiff and *Perkins* to appear and state their respective claims, and maintain or relinquish the same, and to shew cause why the Court should not make such rule &c., touching the same, as the said Court should think fit, pursuant to the statute &c. The sheriff and *Perkins* appeared by counsel, according to the rule, but not the plaintiff; and *Perkins* supported his claim by affidavit. It was thereupon moved (before *Little-dale J.*, in the Bail court) that the plaintiff should be barred and the sheriff give up possession. The learned Judge referred the matter to the full Court. The case now coming on, no person appeared for the plaintiff.

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Lamley for the claimant *Perkins*. The goods ought to be restored, and (as the sheriff contends) the plaintiff should be barred from proceeding hereafter. In *Donniger v. Hinzman* (a), in the Bail court, it was held that an execution creditor was not a "third party" who could be barred under sect. 3 of the Interpleader Act 1 & 2 W. 4. c. 58. But in a subsequent case of *Lewis v. Jones* (b) the Court of Exchequer held differently. And sect. 6, which affords protection to sheriffs, appears to give them the benefit allowed to other parties by sects. 1 and 3. [*Coleridge J.* You have to shew that the execution creditor is a "third party" within sect. 3. But you more properly stand in that

(a) 2 Dowl. P. C. 424.

(b) 2 Mee. & W. 203.

situation.

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situation. *Patteson J.* Applying sects. 1 and 3, the sheriff seems to stand in the situation of the defendant under those sections, and the claimant in that of a "third party." Sect. 6 does not seem to have contemplated the non-appearance of the execution creditor.] In *Lewis v. Jones* (a) the execution creditor was barred on the sheriff's application. [*Coleridge J.* From what is he to be barred? Can he be deprived of his right to recover?] He may have it; but not against the goods claimed by *Perkins*. It will be sufficient, however, as to *Perkins*, if he has the goods restored to him.

Carrow for the sheriff. The rule ought to be, either that the plaintiff be barred of his claim, or that he bring no action against the sheriff. If the Court cannot interfere to this extent, it is useless for the sheriff to apply for relief under the act. In *Eveleigh v. Salisbury* (b), neither the execution creditor nor the claimant in opposition to him appearing on an interpleader rule obtained by the sheriff, the Court of Common Pleas ordered that the sheriff should sell so much of the goods as would satisfy his poundage and expences, and abandon the rest; and that the parties not appearing should be precluded from proceeding against the sheriff, and the sheriff be discharged. *Donniger v. Hinzman* (c) was decided with reference to the third section of the act. [*Patteson J.* Parties seem to stand in different situations under sect. 3 and sect. 6. The last enacts, in very general words, that the Court shall exercise, for the adjustment of the claims, and relief of the sheriff, "all or any of the powers and authorities hereinbefore contained, and make such rules

(a) 2 *Mec. & W.* 203.(b) 3 *New Ca.* 293.(c) 2 *Dowl. P. C.* 424.

and

and decisions as shall appear to be just, according to the circumstances of the case."

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Per Curiam (a). The plaintiff must be precluded from bringing any action against the sheriff, but only in respect of the goods claimed by *Perkins*. Care must be taken so to confine the rule.

The rule made was, that the sheriff should withdraw from possession of the goods seized under the fi. fa. forthwith, and that no proceedings should be taken against him by the execution creditor in respect of the seizure of the goods claimed by *Joseph Perkins*.

(*) Lord Denman C. J., Patteson, Williams, and Coleridge Js.

The QUEEN *against* The Justices of the West Riding of YORKSHIRE.

Wednesday,
November 23d.

(In the Matter of Dr. THORNTON.)

IN *Michaelmas* term 1836, a rule was obtained calling on the above-mentioned justices to shew cause why a certiorari should not issue to remove into this Court a recognizance of the peace entered into by *William Booth Thornton*, Doctor of Medicine, and two sureties, the record of a conviction of the said *W. B. Thornton* (which will be more particularly described hereafter), and an order of sessions directing the recognizance to be estreated. The motion was made on *Dr. Thornton's*

Where a party bound in recognizance to keep the peace is subsequently convicted at petty sessions of an assault, and the conviction is returned to the quarter sessions, the justices there are not authorized, under stat. 3 G. 4. c. 46., to order an

estreat of the recognizance; but the proceeding for that purpose must be by *scire facias*, as before the statute.

And, where the quarter sessions had made such order, this Court granted a certiorari to bring it up for the purpose of its being quashed.

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affidavit,

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affidavit, stating that, in *April* 1836, he appeared before the magistrates in petty sessions, at *Wakefield*, on a peace-warrant obtained against him by *William Stewart*, and was bound by recognizance in 100*l.* with two sureties in 50*l.* each, to keep the peace for two years towards all his Majesty's subjects, and particularly the said *W. Stewart* : That, in *July* 1836, he was summoned before the magistrates in petty sessions at *Wakefield*, by one *Peaker*, for an assault, and was convicted in the penalty of 5*l.* and costs, which he paid : That the alleged assault on *Peaker* was committed in self-defence : And that, at the West Riding quarter sessions in *October* 1836, the court was moved to estreat the said recognizance, and the said court ordered such recognizance to be estreated : and the deponent stated his belief that it had been estreated accordingly. The clerk to the magistrates in petty sessions deposed, in answer, that he was instructed by the convicting magistrates and *William Stewart* to take proceedings for causing the recognizance to be estreated : That the recognizance and conviction were duly filed by him among the records of the quarter sessions, at the sessions holden respectively in *April* and *October* 1836 : "That the court was moved by counsel at the said last-mentioned quarter sessions to estreat the said recognizance ; and that the said motion was opposed by counsel on behalf of the said *W. B. Thornton* : That, on the hearing of the said motion, the said recognizance and conviction were produced by the clerk of the peace from the records of the said Riding, and that deponent was examined on oath, and proved the identity of the said *W. B. Thornton* as being the same person who entered into the said recognizance and who was convicted as aforesaid."

Sir

Sir J. Campbell, Attorney-General, and Sir G. A. Lewin shewed cause in this term (a). The recognizance and conviction were legal, and there is no ground for bringing them up. Then, the recognizance having become forfeited, it appears that the sessions have ordered it to be estreated. If that order is irregular, it has no operation, and Dr. Thornton is not prejudiced. But the effect of it is, merely, that the forfeited recognizance is to be included in the roll sent by the clerk of the peace to the sheriff, according to stat. 3 G. 4. c. 46. s. 2.; and nothing more is stated to have been in fact done here. The certiorari, therefore, cannot be necessary for this party's relief. The order is, at most, only surplusage; for it is not necessary that the sessions should direct an estreat. If the proceedings are removed, there is no course that can be usefully adopted by this Court with respect to them. It has been a question whether, since the passing of stat. 3 G. 4. c. 46., the process of estreat by the Court of quarter sessions into the Court of Exchequer can any longer be enforced, so as to give the latter court jurisdiction; *Rex v. Hankins* (b), *In the Matter of Pellow's Recognizance* (c); but that is not material in the present case, where nothing more has been done than ordering the forfeited recognizance to be included in the roll made out by the clerk of the peace. The proceeding here is the same, as far as it has gone, with that which took place, and the correctness of which was not disputed, in *Haynes v. Hayton* (d). That case also shews the proper course to be taken for the purpose of appealing to the sessions against an order of

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THE QUEEN
against
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the West
Reading.

(a) November 3d. Before Lord Denman C. J., Patteson, Williams and Coleridge Js.

(b) *M'Clel. & Y.* 27.

(c) 13 *Price*, 299. *S. C. M'Clel.* 111.

(d) 7 *B. & C.* 293.

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The QUEEN
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the West
Riding.

estreat, under stat. 3 G. 4. c. 46. s. 6., which is the course Dr. *Thornton* should have pursued (on a levy being made), if he meant to dispute the forfeiture of his recognizance.

Cresswell and *Wortley*, contra. The object of moving to have the recognizance and conviction brought up was, that the Court might see the instruments on which the sessions made their order. The party now applying to the Court was convicted, not at the quarter sessions, but at a petty session, under stat. 9 G. 4. c. 31. s. 27. Then the justices in quarter sessions, not acting upon any thing that took place before themselves, but regarding the conviction as evidence, ordered the recognizance to be estreated. That was illegal. In *Rex v. Cossins* (a) a recognizance to be of good behaviour was entered into at quarter sessions; and at the next quarter sessions, it being proved by witnesses, in open Court, that the party had been guilty of misbehaviour since entering into the recognizance, the justices estreated it. On motion to discharge the estreat, it was urged that the sessions could not, in a summary way, try the fact of misbehaviour committed out of Court, but that the recognizance ought to have been removed into the Court of Exchequer, and a scire facias sued out, and a breach assigned, which *Cossins* and his pledges might controvert by pleading to the scire facias. The Court of Exchequer discharged the estreat. *Perrowes Case* (b) is to a similar effect. In *Rex v. Heyward* (c) the proceeding for breach of a recognizance for good behaviour was by scire facias; and so it was in *Hutchins v. Periam* (d), on breach of a recognizance to

(a) *Parker's Rep.* 54.(b) 1 *Roll. Abr.* 900. *Execution* (O), pl. 4.(c) *Cro. Car.* 498.(d) 3 *Bulst.* 220.

keep

keep the peace. Where, indeed, the recognizance is for something to be done at the sessions, and default is made, the sessions may estreat, the forfeiture being then incurred in the face of that Court; and in *Haynes v. Hayton (a)* that was so. Stat. 3 G. 4. c. 46. s. 2. provides for transmission to the sheriff, by the clerk of the peace, of a copy of the roll of "forfeited recognizances;" but the question is, what recognizances are returnable by him as forfeited. It is laid down in 7 *Bac. Abr.* 513. (b) that "A court of quarter session cannot proceed against a person for the forfeiture of a recognizance for keeping the peace: but the recognizance must be sent into one of the King's Courts of Record at *Westminster*. Advantage of a forfeited recognizance must be taken by *scire facias*, and not by indictment." The latter proposition is also found in 7 *Bac. Abr.* 135. (c). *Hawk. P. C. B.* 1. c. 60. s. 18. is to a like effect. Stat. 3 G. 4. c. 46. s. 2. makes no new regulation as to the circumstances under which recognizances shall be declared forfeit; it merely facilitates the levying of the penalty where such recognizances are, and would formerly have been, forfeited, "at such court of general or quarter sessions" or otherwise, as stated in the enactment. [*Patteson J.* Could we in this Court declare a recognizance of the peace forfeited, on affidavit of a breach of the peace?] The Courts can not so try a fact which the defendant, and also his sureties, ought to have an opportunity of pleading. *Rex v. Hankins (d)*, and *In the Matter of Pellow's Recognizance (e)*, as well as *Haynes v. Hayton (a)*, were cases

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(a) 7 B. & C. 293.

(b) *Surety of the Peace* (H). 7th ed.(c) *Scire Facias*, (C) 2.(d) *M'Clel. & Younge*, 27.(e) 13 *Price*, 299. *S. C. M'Clel.* 111.

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in which the forfeiture was at the sessions which directed the estreat. By stat. 9 G. 4. c. 31. s. 28., a person convicted of assault under sect. 27. by two justices, and having suffered the punishment, is to "be released from all further or other proceedings, civil or criminal, for the same cause." The order here made, if enforced, is a further proceeding for the same cause. It is contended that the order is a mere nullity; and, if it were so, the Court would probably not interfere to set it aside; but, if it may be made the ground of further proceedings injurious to the party applying, relief ought to be given him. That was held in the case of an award made after the submission had been revoked, in *Doe dem. Turnbull v. Brown (a)*. [*The Attorney-General*. The benefit of pleading to a scire facias is no longer required, because, under stat. 3 G. 4. c. 46. ss. 5, 6., the party whose recognizance is declared forfeit may appeal and have the circumstances inquired into at the general or quarter sessions. Under the old practice it was held, in *Rex v. Tomb (b)*, that, "if recognizances are estreated into the Exchequer, because not punctually complied with, yet if the party appear and take his trial at the next session, he may compound for a very small matter in the Court of Exchequer:" and it is said, there, that judges of oyer and terminer are the proper judges whether recognizances ought to be estreated or spared. In 5 *Burn's Justice*, p. 646. (c) tit. *Recognizance* IV., it is observed that, by parity of reason, it should seem that the justices of the peace in the quarter sessions should have the like power in respect of offences cognisable there. The ordering of an estreat at sessions is

(a) 5 B. & C. 384.

(b) 10 Mod. 278.

(c) *D'Oyly and Williams's* ed.

nothing

nothing but an authority to the clerk of the peace, to enter the recognizance on his roll as forfeited; if the clerk makes an entry charging a wrong individual, he does so at his peril, and the party affected may have his remedy under stat. 3 G. 4. c. 46. s. 6., as he formerly had on scire facias]. The power there given to the sessions is merely to relieve a party whose goods are taken in execution. The enactment does not give any opportunity of contesting the forfeiture. [*Patteson J.* It only gives the power of mitigation, or entire relief from execution, which the Court of Exchequer had before (a)].

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Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After stating the nature of the application, his Lordship proceeded.

The facts of the case as detailed by the affidavits are shortly these. Dr. *Thornton* entered into the said recognizance before a single justice of the West Riding, in the month of *April* last. On the 11th of *July* following, he was convicted of an assault before three justices at their petty sessions, and paid a fine of 5*l.* with costs. At the quarter sessions holden at *Leeds* in the month of *October* last, an application was made to the Court to estreat the said recognizance upon proof of the conviction, a record of which was duly returned, and of the identity of the said applicant, and the same was estreated accordingly. That this was the fact, we think, must be assumed from the affidavits, because the applicant swears that he has been informed, and believes,

(a) See *In the Matter of Fellow's Recognizance*, 13 *Price*, 303. and note, *ibid.*

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that an order to estreat was made; and the affidavit to shew cause, though it alleges that the motion was opposed by counsel, does not deny that an order was made.

We have been for some time in doubt whether the nature and quality of the act done by the sessions did sufficiently appear, it having been contended, in opposition to the application, that the order of sessions was at least inoperative and harmless, whether legal or not. We think, however, upon further consideration, that what has been done is a grievance to the party applying.

It appears, by the 3 G. 4. c. 46. (much adverted to in the argument) s. 1., that stat. 22 & 23 Car. 2. c. 22., which directed the return of estreated recognizances into the Exchequer, is repealed, and a new and more compendious mode of recovering the sums forfeited is by the first mentioned act substituted. And accordingly, by the second section, the clerk of the peace is directed to copy, on a roll, a list (*inter alia*) of all forfeited recognizances both before justices singly or at petty sessions, *and at the quarter sessions*, which roll he is directed to forward to the sheriff with a form of process prescribed by the act, who is thereupon to levy the same; and, by the eighth section, the sheriff is to make a return of what he has done to the quarter sessions, and the clerk of the peace is to certify, in the manner therein prescribed, *to the Lords of the Treasury*. By the repeal, therefore, before mentioned, and this substitution, it seems that the Court of Exchequer no longer retains any jurisdiction over the two sorts of forfeited recognizances, namely, those before justices out of sessions, and those at the quarter sessions. And this is the view of the subject which that Court has taken expressly in
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the case of *Rex v. Hankins* (a), upon a consideration and review of the different clauses of the act now brought under our notice. If, therefore, it be imperative upon the clerk of the peace (as it seems to us it is) to put the law in motion to levy the amount of *all* recognizances forfeited *at the sessions*, it follows, we think, that the party applying for the certiorari is aggrieved necessarily, if the Court had no power legally to make the order. We come now to the question of jurisdiction.

It certainly would seem to be extraordinary if this recognizance was duly estreated, upon formal proof before the sessions of a proceeding had elsewhere, in which the recognizance neither had, nor by possibility could, at all come into question. And we think that the power to make this order should be shewn affirmatively, as, in ordinary cases, the jurisdiction of the sessions over the cases coming before them may without difficulty. We are referred, however, merely to the statute which we have already noticed, 3 G. 4. c. 46., the latter act of 4 G. 4. c. 37. amending only some provisions not material to the present purpose. We think that the first mentioned act has an intelligible and ample operation, if we consider it as directed to the more speedy levying of sums due upon (inter alia) forfeited or lost recognizances, without at all interfering with the method or authority by which those recognizances may legally be put into execution. A sufficient effect is attributed to this act, if we consider it to be applicable to recognizances lost or forfeited before justices out of sessions, and also, at the Court of quarter sessions itself, for matters immediately connected with its own proceedings.

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(a) *Macl. & Younge*, 27.

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Nor do we think that the provision in the sixth section, whereby the sessions are enabled to give relief to persons upon whom a levy has been made in two certain cases (and two only), affords any argument in favour of their jurisdiction to estreat the recognizance. The question of *how* the recognizance may be legally forfeited seems to remain untouched. The case of *Haynes v. Hayton* (a), cited and a good deal relied upon, only proves that, although the sessions have the power of granting relief to a party upon whom a levy is made, when he goes to prison or gives security to appear at the sessions, they have no such power where he pays the money at once in order to get out of trouble. This decision is obviously wholly beside the point now under consideration, which is, whether the Court of quarter sessions had any authority to set the law in motion by estreating the recognizance, upon which the levy follows.

Nor is the argument in favour of the jurisdiction of the sessions advanced by attending to the state of the law generally upon this subject. No rule is more invariable than that a person shall not be prejudiced in any manner without being heard. The affidavit of the applicant gives a favourable turn to the transaction which led to his conviction; but, without placing reliance upon that, it is certain that the conviction may have been wrong: possibly indeed, though bearing the same name, he may not be the same person: he may, therefore, have had cause to shew against the forfeiture of his recognizance, which he has had no opportunity of doing. We were referred to the authorities collected in *Bacon's Abridgement*, under the title *Scire Facias*

(a) 7 B. & C. 293.

(C) 2. (a), and we shall advert to one of them. "If a man be bound in a recognizance to the King, upon condition to be of good behaviour, &c. he cannot be indicted for breach of the good behaviour, by which he forfeits his recognizance, without *sci. fa.*:" and a weighty reason is given: "for if a *sci. fa.* had been brought, he might have pleaded some matter in discharge thereof:" and in the case of *Rex v. Hutchings* (b), which is there referred to, which was a recognizance for good behaviour taken in the Crown Office, it appears that a writ of *scire facias* was brought. And, upon inquiry, we find that the course of proceeding in the Crown Office is uniformly in conformity hereto.

Upon the whole, we think that sufficient appears to induce us to say that the writ of certiorari should go.

Rule absolute.

(a) 7 *Bac. Abr.* 135. 7th ed.

(b) *Cro. Jac.* 412. *S. C.* (as *Hutchins v. Periam*) 3 *Bulst.* 220.

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The QUEEN against DIGNAM.

Wednesday,
November 23d.

THE defendant was indicted for an assault, and pleaded Guilty. He was now brought up for judgment. There were affidavits, both in aggravation and in mitigation; and Sir *J. Campbell*, Attorney-General, appeared for the Crown, and *Clarkson* for the defendant. A question arose, which affidavits were to be read first, and which of the counsel was to address the

Where a defendant, having pleaded guilty to an indictment, is brought up for judgment, the counsel for the Crown is to be heard before the counsel for the defendant; and the affidavits in ag-

gravation are to be read before the affidavits in mitigation.

Contrà, where a verdict of guilty has been taken, though by consent, and without evidence.

Semble, that the rule is not to be varied where several defendants are jointly indicted, and some suffer judgment by default, and others are convicted on verdict. And in such a case, where there was no affidavit in aggravation, but affidavits were offered in mitigation, the Court heard the counsel for the defendants first.

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Court first. The Court (*a*), after referring to the officers of the Crown Office, decided that the affidavits in aggravation should be first read, then the affidavits in mitigation, then the counsel for the Crown be heard, and then the counsel for the defendant (*b*).

(*a*) Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(*b*) On a previous day in the same term (November 14th.), in *Regina v. Caistor*, where the indictment was for misdemeanor in altering a borough rate, a similar question arose. There the verdict of Guilty had been entered at the assizes, by consent, without evidence: and the Court (Lord Denman C. J., Patteson, Williams, and Coleridge Js.) directed the affidavits in mitigation to be first read, then those in aggravation, then the counsel for the defendant to be heard, then the counsel for the Crown.

See *Rex v. Bunts*, 2 T. R. 683.

The following case is from the notes of Mr. Robinson of the Crown Office.

Trinity term,
1828.

The KING against SUTTON and Others.

THE defendants were indicted for a conspiracy to negotiate the appointment of a cadet in the *East India Company's* service; some of them suffered judgment by default, and one was convicted by verdict. The Judge's report having been read, a question arose as to the order in which the affidavits of the defendants should be read (the prosecutor producing none), and the counsel be heard; and it was contended, that the rule laid down in *Rex v. Bunts*, (2 T. R. 683.) applied only to cases where all the defendants suffered judgment by default, or all were convicted by verdict. *Brougham* and *Denman* having been heard for the defendants on this point,

The Court said, that they were not aware of any case, in which the defendants had been convicted in different modes, where this question had been discussed; that the rule was made by themselves, and might, of course, be altered to suit convenience; but that it appeared from the last section of the rule itself that it did not give the defendants the last word in a case like the present, no affidavit being produced by the prosecutor; that, if the case were treated otherwise, inconvenience would be produced, by counsel having to address the Court twice on the same matter. The affidavit for the defendants was therefore read; after which the counsel for the several defendants were heard in mitigation, and then the counsel for the Crown in aggravation.

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MOORE *against* BUTLIN.Thursday,
November 23d.

A RULE nisi was obtained by the defendant, in *Easter* term last, for setting aside an award made in this cause, under the following circumstances.

The declaration was in assumpsit for goods sold and delivered, work and materials, and money paid, and on an account stated: the damages were laid at 200*l*. Pleas: 1. As to the breach of promise in the declaration mentioned, except so far as the same relates to the non-payment of 102*l*. 2*s*. 9*d*., parcel of the said moneys in the declaration mentioned, non assumpsit. 2. For a further plea, as to the causes of action in the introductory part of the first plea mentioned, a set-off. 3. As to the 102*l*. 2*s*. 9*d*., payment into Court. The plaintiff joined issue on the first plea, replied to the second, denying the matter of set-off, and took out of Court the 102*l*. 2*s*. 9*d*. Issue was joined on the replication to the second plea.

On the trial, a verdict was given for the plaintiff for 200*l*., subject to a reference of the cause, and all matters in difference between the parties, to a barrister: the costs of the cause to abide the event of the award. The order contained the usual clause precluding the parties from bringing error. The arbitrator made his award, bearing date *April* 27th, 1837; and he thereby awarded, "That, instead of the verdict entered as aforesaid, the verdict shall be entered as follows, viz. On

Where a cause and matters in difference are referred at nisi prius, a motion to set aside the award may be made after the first four days of the term following the delivery of such award; although the arbitrator finds that neither party has any claim upon the other as to any matters in difference.

A plea of set-off to several counts is not divisible; and the plaintiff is entitled to a verdict generally, unless the defendant proves a set-off equalling the whole of the plaintiff's aggregate demand.

Where, therefore, to a declaration for goods sold and money paid, and on an account stated, the defendant pleaded non assumpsit and a set-off, and, the cause being

referred, the arbitrator ordered a verdict to be entered for the plaintiff on both issues, except as to the count for money paid, and, so far as the issues applied to that count, for the defendant on both, the Court held the award bad in this respect.

both

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both the issues joined between the parties, so far as the same apply to the several counts of the declaration in the said cause except the count for money paid, the verdict is to be entered for the plaintiff: and, so far as the same apply to the said count for money paid, the verdict is to be entered for the defendant. And I assess the plaintiff's damages on the issues found for him at the sum of 19*l.* 5*s.* 1*d.*; and I direct that the damages found by the jury shall be reduced to that sum; and I award and declare that neither of the parties has any claim against the other of them for or in respect of any matters in difference between them."

The award was served on the defendant's attorney, *April* 28th, and the rule nisi for setting it aside was obtained *May* 6th. The grounds of motion were stated in the rule as follows. 1. That the said award is bad, uncertain, and inconsistent, in awarding that on both the issues joined between the parties, so far as the same apply to the several counts of the declaration in this cause except the count for money paid, the verdict is to be entered for the plaintiff, and, so far as the same apply to the said count for money paid, the verdict is to be entered for the defendant. Secondly, that the arbitrator, having directed the verdict on the first issue, so far as the same applies to the count for money paid, to be entered for the defendant, ought not to have directed the verdict on the second issue to be entered for the defendant, merely so far as that issue relates to the count for money paid, but, if he thought the defendant entitled to a verdict on any part of the second issue, ought to have directed the verdict on the second issue to be entered for the defendant generally, or for some certain sum of money, and not to have ordered a
verdict

verdict to be entered for the plaintiff on the second issue except so far as it relates to the count for money paid. Thirdly, that the arbitrator had no power or authority to confine the verdict for the defendant on the second issue to so much thereof as applies to the count for money paid." In last *Trinity* term (a),

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Cresswell and *Swann* shewed cause. First, the application was too late. Where a cause is referred at *Nisi Prius* and a verdict taken, a motion to set aside the award must be made within the same time as a motion for a new trial; *Thompson v. Jennings* (b); at least if no sufficient excuse be shewn; *Rawsthorn v. Arnold* (c). In *Allenby v. Proudlock* (d) *Coleridge J.* decided in favour of the application, because other matters than those embraced by the cause were referred and decided upon. Here the arbitrator has awarded on the matters in the cause, and finds that neither party has any claim beyond those stated on the record. In *Lyng v. Sutton* (e), where a cause and all matters in difference were referred, and the arbitrator, in vacation, made his award directing a verdict to be entered for the plaintiff on one count of the declaration, it was held that a motion for referring the award back was too late, after the first four days of term. Then as to the objections. The general issue is a divisible plea, and raises as many issues as there are counts. The question then is, whether the plea of set-off can also be divided. The defendant objects, first, that it cannot, and that, if he was entitled to a

(a) June 16th. Before Lord Denman C. J., Littleale, and Paterson Js.

(b) 10 B. Moore, 110.

(d) 4 Dowl. P. C. 54.

(c) 6 B. & C. 629.

(e) 5 Dowl. P. C. 39.

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verdict on this plea, as to the count for money paid, the verdict ought to have been entered for him generally. But the set-off, which is here pleaded generally, might have been pleaded to each count severally; in that case, if the plea had been sustained on any count to the amount of a farthing, the defendant would have been entitled to a verdict on such count, and the findings might have been for or against the defendant on the several issues: or the plaintiff might have entered a *nolle prosequi* as to one count and recovered on the others, in which case the defendant would have had his costs as to the count given up. There is, therefore, on principle, no real objection to the present finding. The arbitrator has evidently intended to save the defendant's costs on one issue. He had no power to order (as is suggested) a verdict for the defendant in a certain sum. At *Nisi Prius*, damages would have been given, on the general issue, for the excess of the sum proved due to the plaintiff above that proved due to the defendant; and, if there was any particular issue as to which a set-off was proved, the jury would probably have been discharged from giving a verdict upon it. The arbitrator could not proceed in the same way; he could only direct a verdict for the defendant on the issue as to which a set-off had been established; but he could not order it to be entered as to a particular sum. He has stated, as the result of his inquiry, that 19*l.* 5*s.* 1*d.* is due to the plaintiff; there is nothing to shew that, in doing so, he has not allowed for every sum proved by way of set-off.

Sir *J. Campbell*, Attorney-General, Sir *W. IV. Follett*, and *Peacock*, *contra*. On the first point, *Hayward*

ward v. Phillips (a) is a recent authority, shewing that the present application is in time, the reference being, not only of the cause, but of other matters in difference. [Lord *Denman* C. J. I think that, as this reference is of all matters in difference, we must consider the objection made in time. *Littledale* J. There are reasons for moving within the first four days of term for a new trial, which do not extend to awards. *The Court* then intimated that their opinion was with the defendant on this point.] The defendant has, in effect, pleaded two pleas to each of the four counts of the declaration. As to three of the counts, the issues are found for the plaintiff: but, as to the count for money paid, it is found, on the plea of non assumpsit, that the defendant was not indebted to the plaintiff, and, on the plea of set-off, that the plaintiff was indebted to him. By the award, however, as it now stands, the defendant has no benefit of that finding. The amount owing to the defendant by the plaintiff ought to have been in some manner allowed to the defendant. *Cousins v. Paddon (b)* shews the way in which this might have been done. If the plaintiff did not owe the defendant anything, the verdict ought to have stood, as given at the trial, entirely for the plaintiff. The arbitrator has altered it, and must have had some ground for doing so. His omission to give the intended benefit to the defendant may have been an inadvertence; but it is material with respect to the costs. [*Littledale* J. The award is informal throughout as to the set-off. It ought not to be applied to each count, but a general sum found in which the plaintiff is indebted to the defendant,

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 against
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(a) 6 A. & E. 119. See *Martin v. Burge*, 4 A. & E. 973.

(b) 2 Cro. M. & R. 547. S. C. 5 Tyrwh. 585.

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and that sum deducted from the damages.] Here the amount to be deducted is left uncertain. The defendant would be entitled, on taxation, to his costs of proving so much of the set-off as had been found in his favour; but, as the award stands, the amount of such costs could not be ascertained. A similar objection was pointed out by Tindal C. J., in the case, *In the Matter of Rider v. Fisher (a)*, where the award was set aside.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. After having stated the pleadings, and the material part of the award, his Lordship said:—

A rule nisi has been obtained to set aside this award, on the ground that the issue on the plea of set-off is not divisible; and we are of opinion that it is not. The defendant by that plea admits something to be due on each count of the declaration, and undertakes to prove a cross demand exceeding the aggregate amount of the sums so due. The issue, under *nō debet*, is, not whether *any* sum is due from the plaintiff, but whether a sum is due from him exceeding or equalling the aggregate amount of his demands. Unless such a sum is due the plea would be no bar to the action, although the evidence might reduce the damages. The arbitrator has evidently so treated the issue; for, although, by the verdict as to the count for money paid, he finds that some set-off was proved, yet, by the rest of the verdict, he finds that it does not equal the aggregate demands of the plaintiff on the other counts; and in this he is quite right; otherwise, if the plea were to be

(a) 3 New Ca. 874.

held divisible and applicable to each count separately, this absurdity might follow, that the demand of the plaintiff on each count taken by itself might be less than the set-off, so that the defendant would be entitled to a verdict on the whole of that plea taken distributively, and yet the aggregate amount of the plaintiff's demands might far exceed the set-off, and so the set-off would be no bar to the action. For these reasons we are of opinion that, as the set-off is pleaded to the whole, the issue on it is a single one, and that the plaintiff is entitled to a verdict, unless the defendant proves a set-off exceeding or equalling the whole of the plaintiff's aggregate demands, without regard to the particular amount under each count, or to any other issue on the record applying only to a particular count. And this view of the question will not prevent the defendant from availing himself of any other defence stated on the record, such as payment, or the statute of limitations, by which he may be able so to reduce the plaintiff's aggregate demand, as that his set-off may cover the remainder, for to that extent the plea of set-off is divisible, or rather it must be found wholly for the defendant, not partly for him and partly for the plaintiff. And there is no absurdity in this; for, as the precise sums both in the declaration and the plea are immaterial, it signifies not whether the plaintiff's demand be reduced by failure of proof or by the establishment of one or more of the other pleas on the record, independent of the plea of set-off. If by either mean the plaintiff's demand ultimately established falls short of the defendant's demand, the issue on the plea of set-off ought to be found wholly for the defendant, so

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that in no case can the plea of set-off be properly said to be divisible.

But, though we think that the arbitrator is mistaken in his view of the effect of the pleadings, yet we are of opinion that the party in whose favour that mistake has been made, viz. the defendant, cannot avail himself of it to set aside the award. We have no power to correct the award ; and therefore, if the plaintiff wishes it, this rule must be made absolute : if he is content to pay the costs of the issue so wrongly found for the defendant, the rule must be discharged. The same course was pursued in very similar circumstances in *Ward v. Dean (a)*. The record may be erroneous ; but, by the order of reference, no writ of error can be brought ; and the merits are in no respect affected.

On the last day of this term the rule was discharged.

(a) 3 B. & Ad. 234.

Saturday,
November 25th.

In the Matter of Arbitration between STORY,
JAMES, and ROBINSON.

A submission to arbitration may be made a rule of Court under stat. 9 & 10 W. 3. c. 15. s. 1., though the agreement to refer provides only that the award shall be made a rule of Court.

THE above named persons were partners in trade under an indenture with an arbitration clause. Being about to dissolve partnership, they made an agreement of reference, in writing, for the settlement of certain differences between them. It was part of the agreement that the award of the arbitrators therein named should be made a rule of this Court ; but nothing was said of the submission to arbitration. The award

was

was made: and afterwards, in *Michaelmas* term, 1836, a rule was obtained, making the agreement of reference a rule of this Court. *Crowder*, in this term, obtained a rule to shew cause why the rule of *Michaelmas* term, 1836, should not be set aside; and he cited the *Anonymous* case, 2 *Barnard*. (a), and *Harrison v. Grundy* (b).

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In the Matter of
STORY.

Sir *W. W. Follett* now shewed cause. The agreement of reference provides only for making the award a rule of Court; and on this account it is contended that the rule of *Michaelmas* term, 1836, relating only to the submission, must be set aside. It is, however, laid down in 2 *Tidd's Pr.* 821 (c), that "a consent, in the arbitration bond, to make the award a rule of Court, instead of the submission, will, it seems, warrant the interposition of the Court under" stat. 9 & 10 *W. 3. c. 15. s. 1.*; and *Powell v. Phillips* (d) is cited. And in *Pedley v. Westmacot* (e) it was objected that the consent in the submission bond was to make the award a rule of Court, instead of the submission, and therefore that the case was not within the statute, inasmuch as the power there given to litigant parties is "to agree that their submission of their suit" to arbitration shall be made a rule of Court. But, on *Powell v. Phillips* (d) being referred to, where the submission bond stating that the award should be made a rule of Court, instead of the agreement, was holden to be no objection, Lord *Ellenborough* said that this was the later and more sensible determination; and the Court allowed the award to be discussed. In

(a) 2 *Barnard. K. B.* 163. (b) 2 *Stra.* 1178. (c) 9th ed.

(d) 2 *Tidd*, 821. note h. 9th ed. 3 *East*, 604.

(e) 3 *East*, 603.

1837. *Soilleux v. Herbst* (a), where the arbitration bond provided that either party might apply to make the award a rule of Court, it was held that the submission might be made a rule of Court; and *Harrison v. Grundy* (b), which had been cited against the motion, was said to be "entitled to very little credit." [Lord Denman C. J. referred to — *v. Mills* (c).]

In the Matter of
Stony.

Crowder, contra, again relied upon the cases referred to in moving for the rule nisi. The case in *Barnardiston* (d) was not noticed in *Pedley v. Westmacot* (e). But it is sufficient to rely on the express words of stat. 9 & 10 W. 3. c. 15. s. 1. That clause gave the Courts jurisdiction where they had none before; namely, in arbitrations where the submission was not originally authorised by the Court. The agreement can be made a rule of Court in those cases only where the statute authorises it; namely, where it is agreed that the submission shall be made a rule of Court. Here the agreement is that the award shall be made so, which is entirely different. It cannot be said that the parties have intended to make not only the award but the submission a rule of Court: the agreement is, by the statute, to be "inserted" in the submission; and therefore all the necessary terms of it must appear in writing. A parol submission is ineffectual for the purposes of the statute; *Ansell v. Evans* (g).

LORD DENMAN C. J. In *Pedley v. Westmacot* (e), where *Harrison v. Grundy* (b) was cited, Lord Ellen-

(a) 2 B. & P. 444.

(b) 2 Stra. 1178.

(c) 17 Ves. 421.

(d) *Anonymous*, 2 Barn. K. B. 163.

(e) 3 East, 603.

(g) 7 T. R. 1.

borough held the later determination (in *Powell v. Phillips* (a)) to be the more sensible one. I am of the same opinion; and the party making this application must pay the costs. The rule must be considered as fully settled.

1837.

In the Matter of
Stow v.

PATTESON J. I agree with Lord *Ellenborough* that the later rule is the more sensible.

WILLIAMS and COLERIDGE Js. concurred.

Rule discharged with costs.

(a) 2 *Tidd*, 821. note *k*, 9th ed. 3 *East*, 604.

COOK *against* COOPER.

Saturday,
November 25th.

THE defendant was arrested on a *capias*, indorsed for 179*l*. by affidavit; but the affidavit of debt was for 175*l*. only. He gave a bail-bond to the sheriff for 179*l*. In this term, *Humfrey* obtained a rule calling on the plaintiff to shew cause why the bail-bond should not be delivered up to be cancelled on an appearance being entered.

A defendant having been arrested on a writ indorsed for 179*l*. by affidavit, and having given a bail bond for that amount, the affidavit of debt being only for 175*l*., the Court ordered the bail-bond to be delivered up to be cancelled on an appearance being entered.

Sir *J. Campbell*, Attorney-General, now shewed cause. First, the provision of stat. 12 G. 1. c. 29. s. 3., as to indorsing the sum on the writ, was only directory. It will be said, however, that stat. 2 W. 4. c. 39. s. 4. *sched.* No. 4. has made this absolutely necessary. But the provisions of the late act are, on this point, directory also: there can be no ground for interpreting the two acts on different principles. It is true that the defendant might have refused to give bail

R r 4

for

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 COOK
 against
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for more than the sum sworn to ; but that is no reason for cancelling the bond. But, secondly, supposing the error material, the defendant ought to have applied to a Judge to be discharged without giving any bond : it is too late to object after he has chosen to give the bond.

Humfrey, contra. As to the first point, the authorities are collected in *Chitty's Archbold* (a), where the result is thus stated. " In the first place, by the 12 G. 1, c. 29, s. 2, the sum specified in the affidavit to hold to bail must be indorsed on the back of the writ, and the sheriff must take bail for such sum and no more. This provision was considered only *directory*, and not to have avoided the process when the sum sworn to was not indorsed on it. But the form of the indorsement, as prescribed by the 2 W. 4. c. 39., together with the wording of that act, shew that it is absolutely requisite there should be this indorsement ; and if omitted, it would afford a ground for setting aside the writ as irregular, or for discharging the defendant, or cancelling the bail-bond (if any given), on a common appearance, though it would not render the writ void." And, afterwards (b), the same book refers to the rule of M. T. 3 W. 4. s. 10. (c), " if the plaintiff or his attorney shall omit to insert in or indorse on any writ or copy thereof any of the matters required by the said act " (stat. 2 W. 4. c. 39.) " to be by him inserted therein or indorsed thereon, such writ or copy thereof shall not, on that account, be held void, but may be set aside as irregular, upon application to be made to the Court out of which

(a) 1 *Ch. Archb.* 167. (ed. 6.)

(b) Page 174.

(c) 4 B. & Ad. 3.

the

the same shall issue, or to any Judge." This indorsement is required by the act; for sect. 4 directs that "the process shall be by writ of capias according to the form contained in the said schedule and marked No. 4.;" and the form in the schedule has the indorsement. [*Patteson* J. The indorsement is not omitted here: it is erroneously inserted.] The sum sworn to is not indorsed at all. Could it be said, if the oath were for 20*l.* and the indorsement for 20,000*l.*, that the sum sworn to was indorsed, but erroneously? Then, as to the second point, the passage first cited from *Chitty's Archbold* shews that the bond ought to be cancelled. It is assumed, on the other side, that the defendant exercised a choice in giving the bond; whereas he gave it under the compulsion of an irregular arrest.

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 COOK
 against
 COOPER.

LORD DENMAN C. J. It is not, perhaps, very easy to see how the new act can make any difference as to the effect of an error in the indorsement: but I think that this rule must be made absolute; and, probably, the bond would have been bad before the late act.

PATTESON J. Before the late act, the enactment as to the indorsement of the sum was said to be directory only: but, if a sum was in fact indorsed, and that was larger than the sum sworn to, the party who committed the error must have suffered for it, and the bond must have been set aside.

WILLIAMS and COLERIDGE Js. concurred.

Rule absolute.

1837.

Saturday,
November 25th.

The QUEEN against THOMAS and PHILP.

The Court will not award costs to be paid by the attorney prosecuting a rule for a criminal information, where no circumstance appears making him, personally, a party to such rule; although his conduct may have been such that the Court would, otherwise, have entertained such an application against him.

And therefore the Court refused to make such order for costs where the information had been moved for against magistrates for refusing to examine witnesses on a charge of perjury, although the charge had been instituted before them by the attorney, as was alleged, from improper motives and without authority from the supposed prosecutor, and had entirely failed, and although the magistrates had been served with a notice of motion for a criminal information, purporting (but not proved) to have been signed by the attorney; and an affidavit of the service was made by a person describing himself as clerk, in his support of the rule for an information.

A RULE nisi was obtained this term for a criminal information against *Thomas* and *Philp*, Justices of the borough of *Pembroke*, for having corruptly refused to examine witnesses on a charge of perjury brought before them on behalf of *Richard Harbour* against *Thomas Marychurch*.

Maule now shewed cause against the rule, which was supported by *Hoggins*; and, the opinion of the Court being against granting the rule,

Maule contended that *Arthur Perry*, the attorney who had conducted the proceedings in support of the rule, should be ordered to pay the costs. It appeared that *Perry* had attended before the magistrates as attorney in support of the charge of perjury, and had been very urgent with them to bind over parties to prosecute; that *Harbour* himself did not attend; and that the charge (assuming that the justices had had authority to entertain it) wholly failed; and it was stated (on information and belief) that *Perry* was not authorised by *Harbour* to take the proceedings in his name. It further appeared that Messrs. *Thomas* and *Philp* had been served with a notice of the present application, dated *November 4th*, 1837, and purporting to be signed by *Perry* as attorney for *Richard Harbour*. The affidavit of service was made

by

by a person describing himself as *Perry's* clerk. The only other depositions in support of the rule were made by *Samuel*, the son of *Richard Harbour*. *Richard Harbour* himself made no statement on either side; and the want of any statement by him was not accounted for. In an affidavit by *Thomas*, *Perry's* conduct was ascribed to vindictive feelings; and circumstances were alleged in support of that imputation. *Maule*, in making the present application as to costs, relied on the notice, and on the fact that, although *Perry* himself made no affidavit in support of the rule, his clerk had made one. And he cited *Rex v. Fielding (a)*.

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against
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PHILIP.

LORD DENMAN C. J. I should feel no difficulty, if *Perry* were before us on this rule as a party. But he has not been called upon, in the course of the proceedings, to meet an application like the present. We do not even know that he actually signed the notice which has been referred to. We cannot, therefore, require him to pay costs.

PATTESON, WILLIAMS, and COLERIDGE Js. concurred.

Rule discharged with costs, but not as against *Perry (b)*.

(a) 2 Burr. 654.

(b) See *Hayward v. Giffard*, 4 M. & W. 194. *Regina v. Dodson*, Hil. T. 1839.

1837.

*Saturday,
November 23rd.*

DOE on the Demise of STEPHENS *against* LORD.

Lessor of plaintiff in ejectment recovered against defendant, and taxed the costs. A writ of possession was taken out and delivered to the sheriff in Nov. 1836, but not executed or returned. A second writ of possession was afterwards taken out, in Jan. 1837, which was shortly after set aside for irregularity, with costs, no costs there having passed in the judgment. Held, that the costs of the plaintiff, who was mortgaged in the premises, and had recovered a writ of possession, should not be taxed, but should be paid by the defendant, who was not a party to the judgment. And the Court ordered that the costs of the plaintiff should be paid by the defendant, and that the writ of possession should be executed, and that the plaintiff should be allowed to recover costs.

WADDINGTON, in the present term, obtained a rule calling on the lessor of the plaintiff in this ejectment to shew cause why a writ of restitution should not issue to the sheriff of *Northamptonshire*, commanding him to restore possession to the defendant of certain lands seized by the said sheriff under a writ of possession and *f. h.* the same having been set aside for irregularity, and why the lessor of the plaintiff should not pay the costs of this application. The ejectment was brought by the lessor of the plaintiff as mortgagee of the lands. The cause was tried at the *Northampton* spring assizes, 1834, and a verdict given for the plaintiff. Judgment was signed, and a writ of habere facias possessionem and *f. h.* for costs returnable immediately after execution was issued, and lodged with the sheriff in December last, 1834. For reasons which it is not material to state, the writ was never executed, or returned and filed. In June 1837, the lessor of the plaintiff sued out another writ of possession of the same lands and *f. h.* of the same costs amounting to 20*l.*, and the sheriff gave him possession under this writ, but was not able to evict any goods of the defendant or the lessor. No costs there had been issued in the judgment, and no new ejectment had been brought, nor did any writ of execution appear to have been issued, after the case above mentioned. In July last, 1837, a writ of restitution after restoring the parties upon summons made at order

THE

that the last-mentioned writ of possession and fi. fa. should be set aside for irregularity with costs. No writ of restitution was applied for, or ordered. The lessor of the plaintiff did not dispute the order, but refused to give up possession, alleging that he was entitled to retain the lands as mortgagee, and by virtue of the judgment. The costs awarded by the Judge's order were taxed at 15*l.* 1*s.*

1837.

DOE dem.
STEPHENS
against
LORD.

Warren now shewed cause. A writ of restitution cannot issue while the judgment in ejectment remains unimpeached. Such writ is granted where the judgment is reversed as erroneous; 2 *Lilly's Practical Register*, 472, 475 (a), tit. *Restitution and Re-restitution*; and it must be grounded on some matter of record appearing to the Court; *Lil. Pr. Reg.* 472, 474. The Court has, in this case, pronounced that the lands belong to the lessor of the plaintiff: as Lord *Ellenborough* said in *Doe dem. Taggart v. Butcher* (b), "all right in" the defendant "to the premises is disaffirmed by the judgment." And the judgment here is still in force. The writ of restitution (*Tidd's Pract. Forms*, 655. tit. *Execution* (c)) recites that it hath appeared to the Court that the judgment was irregularly obtained, and the writ of possession thereupon issued improvidently. The several instances of restitution mentioned in *Watson's Treatise on the Office of Sheriff* (d) all suppose a reversal of the judgment or other proceeding on which the execution was founded. [*Coleridge J.* Is your objection merely to the form of the rule?] If the objection be well taken the rule must be set aside. [Lord

(a) Ed. 1719.

(b) 3 *M. & S.* 557.

(c) Ed. 1828.

(d) Pages 163, 191, 192, 214.

1837.

Don dem.
STERNES
against
LOAB.

Denman C. J. We constantly grant a rule in the proper form, where the application is substantially right, though it may have been incorrectly made. *Coleridge J.* Can you maintain that you are entitled to keep possession?] The lessor of the plaintiff admits that the writ of possession was irregular: but, being in possession, and having the right and a judgment in his favour, he cannot be dispossessed. This proposition is, in principle, supported by Lord *Kenyon's* judgment in *Taunton v. Costar (a)*. The case is like that of a party declaring that he enters under process which proves to be irregular, but justifying under legal process which he had also at the time of entry; and such a justification is clearly valid; *Croxteth v. Ramsbottom (b)*, *Lucas v. Nockells*, judgment of *Littledale J. (c)*. [*Patteson J.* What authority is there for saying that a party who has recovered in ejectment may take possession without a writ?] "The plaintiff having judgment to recover his term, may enter without suing out a writ of execution." "for where the land recovered is certain, the recoverer may enter at his own peril: and the assistance of the sheriff is only to preserve the peace." *Wright's Levellers and Tenants*, 505. B. III. c. vii. s. 15. (d) The same doctrine appears in *Rowington on Ejectment*, 475. c. xi. 1. and 2 *Sutton's Practice*, 121. g'. *Don dem. Williams v. Williams* : may be cited as an authority for an order on the issue of the plaintiff to restore possession: but there the judgment was irregular, and was properly, as the Court held, set aside. In *Row dem. Shaw v. Dawson* : the Court ordered the sheriff

(a) 7 T. R. 431.

(b) 10 B. & C. 161—163.

(c) 31 E. L.

(d) 1 A. & E. 267.

(e) 7 T. R. 431.

(f) 10 E. L.

(g) *Rowington*, III. 31. 32.

(h) 1 E. L. 45.

and lessor of the plaintiff, without writ of restitution, to restore three eighths of the premises to the tenant whom the sheriff had turned out; but there the sheriff had committed an excess in giving possession of a parcel not recovered in the ejectment.

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—
Doe dem.
STEPHENS
against
Lord.

Waddington, contra. A party having allowed a judgment in ejectment to sleep for three years cannot afterwards take possession with a high hand in virtue of that judgment. [Lord *Denman* C. J. That is not all; the lessor of the plaintiff here has sued out a writ of possession, which has been set aside. *Coleridge* J. Can your rule be made absolute in the present form?] *Goodright dem. Russell v. Noright* (a) seems to be an authority for it. [Coleridge J. There the judgment was set aside.] An order upon the sheriff to give possession would have been irregular, according to *Doe dem. Williams v. Williams* (b). The judgment here is not in force, though not reversed. If the Court will mould the rule, and call upon the lessor of the plaintiff to restore possession, it will not be necessary to argue the case further.

LORD DENMAN C. J. The rule must be so moulded. On principle, the lessor of the plaintiff cannot be allowed to retain possession. He had obtained a judgment, and a writ of possession which had become a nullity; he then, after the lapse of three years, sued out another writ by which he was enabled to obtain possession with an appearance of authority from the Court

(a) *Barnes*, 178.

(b) 2 A. & E. 381.

which

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*Don dem.
Stevens
against
Lyon.*

which he was not entitled to. He ought not to keep that possession.

PATTISON J. I am of the same opinion. I ought not to go forth that a party having obtained judgment in ejectment may enter without a writ of possession, unless by consent of the person holding. That would be a very dangerous doctrine: and it should not be said that this Court has authorised it.

WILLIAMS J. concurred.

COLERIDGE J. I am of the same opinion. The lessor of the plaintiff has improperly taken possession with an appearance of authority from this Court, and cannot be allowed to retain it.

Ordered, that the lessor of the plaintiff restore possession to the defendant of the lands &c. seized and taken possession of by the sheriff under a writ of habere facias possessionem and that the same having been set aside for irregularity by an order No. dated 11th *July* last and that so much of this rule as relates to costs be discharged.

Goulden Serjeant in this term November 1836, obtained a rule calling upon the defendant to shew cause why all proceedings should not be stayed upon the rule made in this case on 22 November 1837 making the order of July 1836 a rule of Court, and why the costs taxed and allowed upon the said rule, amounting to 15*l.* 11*s.* should not be set off against the

the sum of 84*l.*, the general costs, as taxed and allowed to the lessor of the plaintiff on the judgment obtained by him in this cause. The material facts have been already stated. In *Hilary* term (*January* 12th) 1839,

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STEPHENS
against
LORD.

Waddington shewed cause. These costs cannot be set off, because they are due only on a judgment which, before this rule was obtained, had become inoperative until revived. The lessor of the plaintiff could not recover his costs without a *scire facias*. In 2 *Tidd's Practice*, 1103 (9th edition), it is said, "The reason why the plaintiff is put to his *scire facias* after the year is, because when he lies by so long after judgment, it shall be presumed that he hath released the execution; and therefore the defendant shall not be disturbed, without being called upon, and having an opportunity in Court of pleading the release, or shewing cause, if he can, why the execution should not go;" and 2 *Inst.* 470, is cited. This is an attempt to obtain the effect of a revival by *scire facias*, by means of a motion. The costs claimed by the lessor of the plaintiff are, properly speaking, not now due: the defendant is entitled now to enforce the other costs by attachment. If this rule were made absolute, it is not shewn how it can be carried into effect: the lessor of the plaintiff does not propose to enter up satisfaction on the record of the judgment in ejectment for the costs to be set off. *Mortimer v. Piggot* (a) shews that, if the defendant had been taken on a *ca. sa.* for these costs, issued after the year and day, he would have been discharged, and would not

(a) 4 *A. & E.* 363. note (d).

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waive the objection by remaining for any length of time in custody.

Goulburn Serjt. and *Channell*, contra. The scire facias is necessary, not to create or revive the right given by the judgment, but to enable the successful party to have the fruits of the judgment. The want of a scire facias stops execution, but does not affect the debt. Thus an action of debt may be brought, after the year and day, on the judgment, without reviving it by scire facias, as is stated in 2 *Tidd*, 1103. [*Coleridge* J. Could the account be taken at this moment?] The absence of a scire facias would be no impediment. It does not follow that a claim cannot be made available by way of set-off because it cannot be enforced by execution. In an action by the defendant against the lessor of the plaintiff, these costs could be set off. [*Coleridge* J. Is that clearly so? (a)]

LORD DENMAN C. J. The objection is fatal. The judgment has expired. We cannot tell that the defendant might not have a good plea to a scire facias for reviving it.

LITLEDALE, WILLIAMS, and COLERIDGE, Js. concurred.

Rule discharged.

(a) See *Reynolds v. Bering*, 4 *Doug.* 181, and *S. C.*, note (a) to *Evans v. Prosser*, 3 *T. R.* 188.

C A S E S

ARGUED AND DETERMINED

1838.

IN THE

Court of QUEEN'S BENCH,

AND

UPON WRITS OF ERROR FROM THAT COURT TO THE

EXCHEQUER CHAMBER,

IN

Hilary Term,

In the First Year of the Reign of VICTORIA.

The Judges who usually sat in Banc in this term were

LORD DENMAN C. J.

WILLIAMS J.

LITLEDALE J.

COLERIDGE J.

MARY CAROLINE EVANS *against* TAYLOR.

TRESPASS. The first count was for breaking and entering the plaintiff's closes covered with water, and taking and converting fish, to wit, lamperns &c.

On a question as to the boundary of a manor, formerly, but no longer, part of the duchy of Lancaster, a document of the time of Elizabeth (when the manor belonged to the duchy) was offered in evidence. It was produced from the duchy office, and purported to be a survey of the manor, taken by J. W., deputy of the surveyor-general of the duchy, by authority of letters of deputation to J. W., by the oaths and presentment of such of the tenants of the manor whose names were subscribed. The names of twenty persons followed, described as "jurors at the Court of Survey:" and it was added, that they, being examined, did present &c. Then came a statement of the boundaries, a list of tenants and rents, and a presentment of the demesnes, of customs, of injuries suggested, and of some other particulars. No authority for taking the survey was proved, except as above-mentioned.

Held, that the document was not admissible, either as a survey appearing to be taken by the proper officer, agreeably to the statute *Extenta Manerii*, 4 Ed. 1. stat. 1., or as furnishing evidence of reputation.

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The second count was for trespasses on the plaintiff's several fishery; the third for trespasses on her free fishery; the fourth for taking away and converting dead fish of the plaintiff. The defendant pleaded, 1. Not Guilty, generally; 2. To the first count, that the closes were part of the river *Severn*, and that the locus in quo was, and from time &c. had been, part of a public navigable river in which the tide flowed and reflowed, and that every subject of the realm, at the times when &c., had the liberty of fishing in that part of the same river, called the *Severn*; 3. A like plea to the first count, alleging the closes to be part of an arm of the sea; 4. As to one of the closes mentioned in the first count, and the taking, &c., lamperns therein, a prescriptive right in the defendant and his predecessors, occupiers of a certain messuage, &c., to fish in the said close for lamperns. The plaintiff, by her replication, traversed the prescriptive right, and, as to the closes in which public rights were claimed, she prescribed for a sole and several fishery in those closes as being within and parcel of the manor of *Minsterworth*, of which she was seised in fee. The defendant traversed the alleged rights of the plaintiff; and issues were joined on the several traverses.

On the trial before Lord *Denman* C. J. at the *Gloucester* summer assizes, 1835, the plaintiff, to prove that the locus in quo was within the boundary of the manor, called as a witness the deputy record keeper in the duchy of *Lancaster* office, who produced, from that office, a document bearing date 25th October, 33 Eliz. A. D. 1591, at which time the manor of *Minsterworth* was parcel of the duchy.

It was headed, "Manor of *Minsterworth*, *Gloucestershire*. A survey thereof taken the 25th day of October,

in the thirty-third year" &c., "by *John Worth*, gentleman, deputy unto Sir *John Poyntz*, Knight, General Surveyor of the Duchy of *Lancaster* lying on the south parts, by the authority aforesaid (*a*), performed by the oaths and presentment of such of the tenants of the said manor, as hereafter follows," viz. Then followed a list of twenty names, in the margin of which was written "The names of the jurors at the Court of Survey." And after the names was written, "Who, being examined, do, for the circuit and boundary of the said manor, present: That the boundary of the said manor beginneth" &c. (setting out the limits): "Without which circuit and boundary aforesaid there lieth" &c. (mentioning some outlying lands and premises, and the tenants of them): "Within which circuit and boundary of the said manor, and within the circuit of the recited premises, all waifs, strays, felons' goods," &c., "and all other things incident to a royalty do belong unto her Majesty." Then followed lists of the "supposed freeholders," and of the customary tenants, with their holdings; an entry of "certain rents due to her Majesty" by the tenants and inhabitants of the manor; a presentment of the demesnes; a statement of customs (as to commons, officers of the manor, &c.); and a presentment of "injury suggested" by reason of certain irregularities. In this part of the survey it was presented "That the fishing of the river *Severn*, from

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(*a*) The survey was bound up in a volume with others, and the first survey in the volume had a similar heading (*mutatis mutandis*) to that set forth above, except that, in place of the words "by the authority aforesaid, performed, by the oaths," were the following; "by virtue of letters of deputation unto the said *John Worth* made, dated" &c., "by the commandment of the Honourable Sir *Thomas Heneage*, Knight Chancellor of the said duchy as also by oaths," &c. The intermediate surveys all referred to the "authority aforesaid."

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Crewell Cross to Woodleys Bridge, doth belong unto her Majesty, which is used and enjoyed by the tenants and inhabitants of the said manor under the yearly rent aforesaid, between which boundaries of the said river divers of the tenants and inhabitants of *Elmore* do fish, where by right they ought not; which is to the great prejudice and hindrance of the tenants of the said manor, because they rent it as aforesaid; the names of which tenants and inhabitants are as follows," &c. The survey closed with a statement of the total amounts of different rents.

It was proved that an order had been made by the Queen for payment of the surveyor general's expenses in making the above survey. The manor, with all waters, fisheries, &c., was granted away from the Crown by *James I.*

The Lord Chief Justice thought the survey inadmissible, there being no proof of any authority under which it was made. The plaintiff's counsel argued that it was at least evidence of reputation; but his Lordship refused to admit the document. A verdict having been found for the defendant, *Talfourd Serjt.*, in *Michaelmas* term 1835, obtained a rule nisi for a new trial, on the ground (among others) of the rejection of evidence. He cited, in moving, *Nicholls v. Parker (a)*, *Freeman v. Phillipps (b)*, *Crease v. Barrett (c)*, and *Drinkwater v. Porter (d)*. In *Hilary* term 1837 (e),

Ludlow Serjt. and *R. V. Richards* shewed cause. First, as to the manner of introducing the survey: it was

(a) 14 *East*, 331.(b) 4 *M. & S.* 486.(c) 1 *C. M. & R.* 919. *S. C.* 5 *Tyrwh*, 458. (d) 7 *C. & P.* 181.(e) *January 17th.* Before Lord Denman C. J., *Williams and Coleridge J.*s.

merely



merely proved to have come from the Duchy office, without any more particular evidence as to the custody, or the documents with which it was associated. The extent of Crown lands, admitted in *Rowe v. Brenton* (a), was introduced by much fuller preliminary evidence. Next, such a document as this may be evidence as between the Crown and a subject, and yet not be so as between private persons. And, further, no commission or other authority is shewn for taking this survey: it has the character of a mere voluntary enquiry made by a proprietor into the condition of his own estate. And, at all events, if the officers of the Crown could enquire into the existence of a fishery as part of the possessions of the duchy, and the value of such fishery, they could not authoritatively lay down its boundary.

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Talfourd Serjt., Shepherd, and Lumley, contra. The survey was part of a series of documents relating to the possessions of the duchy, produced from the duchy office, a place publicly known, and where such an instrument ought to be found if genuine; it was brought into Court by the proper officer; and there is no ground for the distinction suggested between cases where the Crown is a party and those where the dispute is between private persons. [Lord *Denman* C. J. I believe that distinction has never hitherto been taken. I do not think that we are at all impressed with the argument as to the custody, or as to the transfer of this manor from the Crown to a private person.] Then as to the survey itself. It was made by the Crown; it related to a matter of public concern; and the officer taking it appears to have been one whose duty it was to conduct such an

(a) 8 B. & C. 747.

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inquiry into the possessions of the Duchy. It would have been against his duty to do it without authority. This was the line of argument pursued by *Bayley J.* in *Rowe v. Brenton* (a), on the question whether the extent of the manor of *Tewington* was admissible in evidence, no statement appearing upon it of the authority under which it was taken, and no commission for taking it being produced. *Bayley J.* there appears to have relied upon the circumstance that the extent appeared to have been taken conformably to the statute *Extents Manerii* (b). The survey here follows very nearly the order prescribed by the statute, and may therefore be presumed to have been made in pursuance of it. Lord *Tenterden* said of the extent just mentioned, in *Rowe v. Brenton* (c), "The only ground of argument against its reception is, that it does not appear to be taken under any warrant from the King or any competent authority; but considering the nature of the instrument itself, and the statute that requires such things to be done, and the place in which it is found, we must presume that it was not taken without proper authority. I do not know that that authority need be given by any letters-patent or any instrument; I do not know that the King might not, verbally, or by one of the superior officers, have directed it to be taken: we must presume that it was taken by a competent authority." In *The Vicar of Kellington v. The Master and Fellows of Trinity College* (d), a survey of ecclesiastical possessions, taken in 1563, and produced from the First Fruits office, was held admissible without proof of the authority under which it was made; and *Parker C. B.* said, "These surveys have always been allowed as proper evidence,

(a) 3 Mann. & R. 169. 8 B. & C. 749. (b) Stat. 4 Ed. 1. stat. 1.

(c) 3 Mann. & R. 169. 8 B. & C. 748, 749. (d) 1 Wils. 170.

and

and to be read, notwithstanding the commissions under which they were taken be lost." But, further, the present survey was at all events evidence of reputation, being the declaration of persons who at the time were tenants of the manor. The answers of tenants of the manor at an assession court were admitted in *Rowe v. Brenton* (a). In *Crease v. Barrett* (b) the answers of conventional tenants of the manor were held admissible as evidence of reputation coming from persons connected with the place and subject matter to which the alleged custom related. The declarations of a deceased lord as to boundary were held there to have been properly rejected as evidence of reputation; but that was because they did not relate to the boundary of the manor, but to that of the lord's own waste. [Coleridge J. The declaration, being, in substance, that his boundary came up to a certain point, might be for, rather than against, his own interest.] Supposing, here, that the persons whose names are affixed to the survey were merely ten or twenty of the tenants assembled without authority, still their report is the declaration of neighbouring persons, having a concern in the subject-matter, that an exclusive right belonged to the Crown in a public navigable river. If reputation is evidence to affirm public rights, it is evidence to narrow them: this was ruled in *Drinkwater v. Porter* (c).

Cur. adv. vult.

Lord DENMAN C. J. in this term, *January* 19th, delivered the judgment of the Court as follows.

On the trial of this cause before me at *Gloucester*, I

(a) 8 B. & C. 765. (b) 1 C. M. & R. 919. S. C. 5 Tyrwh. 458.

(c) 7 C. & P. 181.

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rejected a document tendered in evidence, as to the admissibility of which we have entertained considerable doubt. It was the survey of the manor of *Minsterworth*, parcel of the possessions of the Duchy of *Lancaster*, made by a person named "deputy to Sir *J. Poyntz*," surveyor, appointed by Queen *Elizabeth*, on the finding of certain tenants of the manor at a court of survey. The evidence was tendered to shew what were the boundaries of the manor. The action was in trespass on plaintiff's close covered with water, on her free fishery, and on her several fishery, with a count for trespass in carrying away plaintiff's fish. Besides the general issue, defendant placed several justifications on the record; but the only one on which the trial proceeded was, that defendant and all those who held his messuage and tenements (abutting on the locus in quo), for sixty years, had and enjoyed the privilege of fishing for lamperns in the locus in quo. The replication (a) stated that the plaintiff, as lady of the manor of *Minsterworth*, and all those &c., have enjoyed from time beyond memory the sole and several privilege of fishing on the close, which was the river *Severn*, at that spot. This right being traversed, it was necessary to show that the locus in quo was in the manor of *Minsterworth*; and the survey was tendered for the purpose of proving it.

On the argument before us the admissibility of this document was mainly rested on the authority of *Rowe v. Brenton* (b), where the Court admitted a document purporting to be an extent of the manor of *Tewing-*

(a) The replication, as to this plea, merely traversed the prescriptive right as pleaded. See p. 618, *antè*.

(b) 8 B. & C. 747.

ton, temp. *Edw.* 3., by the steward of the king's land on this side *Trent*. They decided that the statute applied to the possessions of the Duchy, as well as those of the Crown. Whether the statute authorised more than one survey to be made was not argued; but, assuming that this ought to be done from time to time, the Court very reasonably inferred from the form and contents of the document that it was an act of official duty prescribed by that statute. The question turned there wholly on the right of the conventional tenants of lands in certain manors belonging to the Duchy to minerals there found. The document stated the privileges enjoyed by such tenants. Now the eighth section of the statute 4 *Ed.* 1. (stat. 1.) directs enquiry to be made of freeholders' services, value, and rent, whether they follow the county court, and what heriots are payable to the lord; and the ninth section directs enquiry also "of customary tenants, that is to wit, how many there be, and how much land every one of them holdeth; what works and customs he doth, and what the works and customs of every tenant be worth yearly, and how much rent of assize he paid yearly besides the works and customs, and which of them may be taxed at the will of the lord, and which not." The Court, considering that this document conveyed direct information on the very point in issue, and might, on the grounds above stated, have been in exact conformity with the aforesaid statute, were surely well warranted in holding the instrument authentic and legitimate.

It is, however, remarkable that this statute, *Extenta Manerii*, does not contain the word *manor*, though no doubt that species of property is within it; but it gives no power to define boundaries of manors.

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The report, then, of the deputy surveyor, that the tenants of a particular manor had at a Court of survey found its boundaries, is a statement which they were not authorised by this statute to make, nor he to receive; and the contents of this document do not bring it within the description of proceeding enjoined by this statute. If this be so (and I may observe that *Rowe v. Brenton* (a) was never mentioned at Nisi Prius), we must now examine the argument which was then pressed on my consideration. It was contended that, though the proceeding of Sir John Poyntz might have no legal authority, yet the reported declaration of the tenants of the manor must be considered good evidence as shewing the reputation of that time in respect of its boundaries; *Freeman v. Phillips* (b) and *Crease v. Barrett* (c) were cited to this effect. But in the former case there had been an actual suit in the Exchequer: depositions then taken of persons representing the same interest as that of plaintiff *Freeman* were produced. The only presumption then, that the Court had to make, was that these were real parties to the suit, and that they made the depositions actually sworn to in their names. In the latter case no doubt existed that similar depositions, made by conventional tenants in answer to interrogatories, were the real statements of parties actually interested in a pending proceeding, though the nature of it (owing to the loss of the commission) could not be ascertained. A similar presumption of verity in the proceedings was the only thing here required to make the depositions good evidence. The present case is entirely different; for the deputy surveyor of the Duchy does

(a) 8 B. & C. 737.

(b) 4 M. & S. 486.

(c) 1 Cro. M. & R. 919. S. C. 5 Tyrwh. 458.

not

not appear to have had any authority to institute the enquiry; and, stripped of this authority, he has not merely no right to make any kind of return, but the presumption that he did make it falls to the ground. The paper may have been written by any clerk idling in the office, from his own imagination, or compiled possibly by some interested person in furtherance of a sinister object of his own. From these considerations, it appears that the document was no evidence for any purpose.

Rule discharged (a).

(a) See *Brisco v. Lomax*, May 3d, 1838.

PRINCE *against* SAMO.

CASE for a malicious arrest for 60*l.* Plea, Not Guilty.

On the trial before Lord *Denman* C. J., at the *Mid-dlesex* sittings after *Trinity* term 1836, it appeared that, in the action in which the defendant arrested the plaintiff, the defendant's claim had been 60*l.* for money lent; that the plaintiff had resisted the claim on the ground that the advance was a gift and not a loan; that the verdict had been in his favour, and that he had had judgment thereupon. In the present action, a witness for the plaintiff, his attorney, stated, on cross-examination, that the now plaintiff, after the first action, had indicted a witness, who appeared for the defendant on the first trial, for perjury at that trial; that the now plaintiff had been a witness on the trial of that indictment, and had then stated, on his cross-examination, that he had been remanded by the Court for the relief of Insolvent Debtors. The counsel for the plaintiff,

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A witness, who has been cross-examined as to what plaintiff said in a particular conversation, cannot, on that ground, be re-examined as to other assertions, made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related. Although the assertions, as to which it is proposed to re-examine, be connected with the subject-matter of the present suit.

1838. . plaintiff, on the re-examination of this witness, proposed
 ——— to ask him whether the plaintiff had not also, on the
 PRINCE trial of the indictment, sworn that the advance now in
 against question was a gift, and not a loan. The question was
 same. objected to; and the Lord Chief Justice ruled that it
 could not be put. Verdict for the defendant. In
Michaelmas term, 1836, Sir *F. Pollock* obtained a rule
 to shew cause why the verdict should not be set aside,
 and a new trial had.

Sir *W. W. Follett* and *Chandless*, shewed cause in
Michaelmas term last (a). The question rejected did
 not arise out of the cross-examination. It will be
 argued that this case falls within the supposed rule, that
 the whole of a conversation may be given in evidence, if
 any part of it be so given. But the rule is not so ge-
 neral. There may, in the case of a written document,
 be a difficulty in separating matter connected with that
 which is insisted on by the party producing such
 document from the matter not so connected, because the
 whole document, not a part of it, is laid before the jury:
 but, in the case of parol evidence, a witness should be
 stopped as soon as he proceeds to state what is not ma-
 terial. The principle upon which one part of a con-
 versation is admitted when another has been proved is,
 that otherwise some qualification or explanation of the
 part received in evidence might be excluded. That
 principle stops short of making the whole conversation
 admissible, whether or not connected with the part
 proved. [*Patteson* J. referred to 1 *Stark. Ev.* 180. ed 2:
 “Where a witness has been cross-examined as to a con-

(a) November 21st, 1837, before Lord Denman C. J., *Patteson*, *Wil-*
liams, and *Coleridge* Js.

versation with the adverse party in the suit, whether criminal or civil, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation; not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relate to the subject-matter of the suit; because it would not be just to take part of a conversation as evidence against a party, without giving him at the same time the benefit of the entire residue of what he said on the same occasion."] That is laid down exclusively on the authority of a dictum of *Abbott C. J.* in *The Queen's Case (a)*. It will be found that this dictum was extra-judicial, the questions propounded by the House of Lords relating to the declarations of a third party; and the judges confine the doctrine respecting these to matter shewing the signification of the words and declarations previously given in evidence, and the motive for uttering them: and the distinction between the two cases cannot be supported. But even the dictum is limited to the subject-matter of the suit: here the matter proposed to be given in evidence related to a previous suit. There were, in fact, two different conversations. Except from the subject-matter, it would be impossible to lay down a test as to what did or did not form part of a single conversation. Every thing that passes while the parties conversing remain in each other's company cannot necessarily belong to the same conversation; as, for instance, where two parties make a long journey together in the same carriage.

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(a) 2 B. & B. 297, 298.

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Sir *F. Pollock* and *Ball*, contra. It is impossible to resist this rule, except upon arguments which would shew that a part of a letter may be read without reading the whole. Indeed the separation of a written document into distinct subject matters is much easier than such a process in the case of oral conversation (a). It is true that in Chancery a party of whose answer a portion has been read is not entitled to insist upon every thing contained in the answer being taken as proved: but, at law, the whole must be read if a part be read; *Lynch v. Clerke* (b), *Earl of Bath v. Bathersea* (c), where it is said that "it is like examination of witnesses." [*Cole-ridge J.* Has the question ever been decided as to depositions?] No express decision has been found. This comes within the analogy of an admission, as to which the following rule is laid down in 1 *Phil. Ev.* 110. (ed. 7.) (d): "It is scarcely necessary to observe, that the whole of an admission must be taken together, in order to shew distinctly the full meaning and sense of the party. Thus, if a person, in making an admission against his own interest, refers to a written paper, without which the admission is not complete, the contents of the paper ought to be shewn, before the statement can be used as evidence against the party. Or, if a person says, 'that he did owe a debt, but that he had paid it,' such an admission would not be received as evidence to prove the debt, without being also evidence of the payment. What he has said in his own favour may perhaps weigh very little with the jury, while his admission against himself may be conclusive; however, it is reasonable, that if any part of his state-

(a) See *Catt v. Haward*, 3 *Stark. N. P. C.* 6. (b) 3 *Salk.* 154.

(c) 5 *Mod.* 9. And see 1 *Stark, Ev.* 286, 287. (2d ed.)

(d) See 1 *Phil. Ev.* 357. (8th ed.)

ment is admitted in evidence, the whole should be admitted." In *Thomson v. Austen* (a) Abbott C. J. said, "It is at all times a dangerous thing to admit a portion only of a conversation in evidence, because one part taken by itself may bear a very different construction, and have a very different tendency, to what would be produced if the whole were heard; for one part of a conversation will frequently serve to qualify and to explain the other." [They then contended that the matter referred to by the question was in fact connected with the matter previously received in evidence; but the Court intimated that, from the course taken at the trial, and in moving for the rule, this line of argument was not open to them.]

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Lord DENMAN C. J., in this term (*January* 29th), delivered the judgment of the Court.

This was an action for malicious arrest on a false suggestion that money was lent by defendant to plaintiff, when it had been in fact given. The plaintiff called his attorney as a witness; he happened to have been present at the trial of a prosecution for perjury instituted by the plaintiff against a witness in the action wherein he had been arrested. The defendant's counsel inquired of him, in cross-examination, whether the plaintiff had not, on the trial for perjury, stated that he himself had been insolvent repeatedly, and remanded by the Court. This question was not objected to. On his re-examination the same witness was asked whether plaintiff had not also, on that occasion, given an account of the circumstances

(a) 2 D. & R. 361.

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out of which the arrest had arisen, and what that account was, for the purpose of laying before the jury proof that the arrest was without cause, and malicious, of both which facts there was scarcely any, if any, evidence whatever. This question, expressly confined to that purpose, was whether plaintiff did not say, in the course of his examination, that the money was given, and not lent. To this question the defendant's counsel objected, not on account of its leading form, but because the defendant's having proved one detached expression that fell from the plaintiff when a witness does not make the whole of what he then said evidence in his own favour. My opinion was that the witness might be asked as to every thing said by the plaintiff, when he appeared on the trial of the indictment, that could in any way qualify or explain the statement as to which he had been cross-examined, but that he had no right to add any independent history of transactions wholly unconnected with it.

That a witness's statement of some one thing said by him, though drawn out by a cross-examination, does not permit the opposite party to add to it all that he may have uttered on the same occasion, was in effect decided by seven out of eight Judges whose opinion was taken by the House of Lords in the progress of the bill of Pains and Penalties against her Majesty Queen *Caroline* (a). Lord *Tenterden*, in delivering that opinion, said, "I think the counsel has a right, upon re-examination, to ask all questions, which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if

(a) 2 B. & B. 597.

they

they be in themselves doubtful, and, also, of the motive, by which the witness was induced to use those expressions; but, I think, he has no right to go further, and to introduce matter new in itself, and not suited to the purpose of explaining either the expressions or the motives of the witness." And, "as many things may pass in one and the same conversation" which do not relate to either, the learned Chief Justice declared the opinion of the Judges, that the witness could not be re-examined even to the extent of all that might have passed relating to his becoming a witness, to which the statement proved had reference.

Lord *Wynford*, then Mr. Justice *Best*, it is true, dissented (a) from this doctrine, and thought that the whole matter that passed in the same conversation was made admissible by the adversary's introduction of any part. But he rested his dissent on the propriety of giving a witness a full opportunity of self-vindication, which, in truth, the opinion of the seven Judges already secured for him; and he also lamented that the prevailing rules of evidence were too narrow, and thus proved that he rather thought it a good opportunity to extend them, than was contented to abide by them.

Lords *Eldon* and *Redesdale* are also reported, in the Parliamentary Debates (b), to have intimated their disagreement from the opinion of the seven Judges. They however acted upon it; and the extreme caution with which the former learned Lord framed and often remodelled the question to be proposed to the Judges can hardly be reconciled with the doctrine that the whole

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(a) See 2 *Hansard's Parl. Deb. New Series*, p. 1302.

(b) 2 *Hansard's Parl. Deb. New Series*, pp. 1309, 1310.

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of what passed at the conversation referred to was for that reason admissible.

Upon the whole, we think it must be taken as settled that proof of a detached statement made by a witness at a former time does not authorise proof by the party calling that witness of all that he said at the same time, but only of so much as can be in some way connected with the statement proved.

But, in the present case, the statement did not proceed from a witness, but from a party to the suit; and the opinion delivered by Lord *Tenterden* is not only confined to the former case, but is expressly said by him not to apply in the latter. His language is accurately cited by Mr. *Starkie* (*Evidence*, vol. i. 180. ed. 2.), from 2 *B. & B.* 297. (His Lordship here read the passage cited *antè*, p. 628, 9.)

We forbear from entering into a detailed examination of the doctrine here laid down. We have considered it repeatedly with the utmost care and with all the diffidence inspired by such an authority; but we cannot assent to it. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extra-judicial; that it was not necessary as a reason for the answer to the question that was proposed; that it was not in terms adopted by Lord *Eldon*, or any of the other Judges who concurred; that it was expressly denied by Lords *Redesdale* and *Wynford*; and that it does not rest on any previous authority. We ought to add that, in our opinion, the reason of the thing would rather go to exclude the statements of a party making declarations which cannot be disinterested.

Nothing would be more easy than to find or imagine
 examples

examples of the extreme injustice that might result from allowing such statements to be received. But none can be stronger than the actual case. Because the plaintiff was shewn to have said that he was insolvent, he would have been allowed, without any reference to his own insolvency, to prove by his discourse at the same period every averment in his declaration, with every circumstance likely to excite prejudice and odium. And, if this were evidence, the jury would be bound to consider, and might give full effect to it, and thus award large damages for an injury of which no particle of proof could be found but the plaintiff's own assertion.

We are of opinion that the line was correctly drawn at the trial; and this rule must be discharged.

Rule discharged (*a*).

(*a*) See 2 *Phil. Ev.* 942. (8th ed.)

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DOE on the demise of WILLIAM HODGSON
CADOGAN *against* DAVID EWART.

Testator devised personalty to trustees, to pay debts, and invest the surplus, and to receive the interest, and pay it to his wife during her life and widowhood, and afterwards to apply

EJECTMENT for lands in *Cumberland*. Issue having been joined, the facts were stated, by consent of parties, for the opinion of this Court, in a case, which was substantially as follows.

Richard Hodgson, by his will, dated 18th January 1828, devised (a) unto *Jane Dalston Hodgson* and her assigns, the interest, or a sufficient part, to the maintenance of his daughter *I.*, until she should attain the age of twenty-five, and then to pay and assign the principal and unapplied interest to her; but, in case she should happen to die before attaining that age, leaving lawful issue, then in trust to pay the same to such issue, share and share alike, if more than one, as soon as they should respectively attain twenty-one, and to pay the interest towards their maintenance in the meantime; but, in case *I.* should happen to die under twenty-five, and without leaving lawful issue, testator bequeathed the whole surplus of the personalty to *W.* and *D.*, share and share alike.

By the same will, he devised to *D.* an annuity of 200*l.* for life, charged on his land, to be paid by the above-mentioned trustees; and he devised to the same trustees (one of whom was *W.*), and the survivors and survivor, and the heirs of the survivor, all his lands, charged with the annuity, and with so much of his debts, legacies, and funeral expenses, as the residue of the personalty would not extend to, in trust to receive the rents, issues, &c., and apply them to the use of testator's wife, during her life and widowhood, and afterwards to apply the rents, &c., to the maintenance of *I.* until she should attain the age of twenty-five, and afterwards in trust for *I.* and her heirs; but, in case it should happen that *I.* died without leaving lawful issue, then testator devised the lands to *W.* and *D.* in fee, as tenants in common. The will also empowered the trustees, in order to pay debts, &c., in case the residue of the personalty should be insufficient, to sell any part of the lands, and to grant, alien, and convey the same lands, or any part thereof, in fee simple.

The testator's wife died in his lifetime; *I.* survived the testator, and attained the age of twenty-one, but died under twenty-five, leaving no issue.

The personalty not being sufficient to pay the debts, the trustees sold part of the land.

Held, 1. That the trustees took a legal fee simple in all the land, such estate being requisite for the purposes of the trusts.

2. That, on the testator's death, *I.* took a vested equitable estate tail, and *W.* and *D.* took equitable remainders. And, therefore,

3. That, *I.*, by suffering a recovery in which the trustees did not join, created no legal estate; but that the equitable remainders of *W.* and *D.* were barred.

(a) The will commenced with bequests of personalty; and the Court directed that the whole should be considered as part of the case. The bequests of personalty were substantially as follows. The testator, after bequeathing household furniture and other personal chattels to his wife *Mary Hodgson*, gave the residue of his personal estate to trustees (the same

assigns, during her natural life, one yearly annuity or rent charge of 200*l.*, to be issuing and payable out of all such messuages, lands, tenements, and real estate (except his estate at *Fauld*) as he might be possessed of at the time of his decease, to be paid, by the trustees after named, to her by half-yearly payments. And he devised to his sister *Jane Hodgson* the dwelling-house, &c., then in her occupation, situate at *Fauld*, in the parish of *Burgh by Sands*, during her natural life, for her own residence only. And he devised to *John Forster*, therein described, and to the lessor of the plaintiff *William Hodgson Cadogan* (by his then name of *William Hodgson*), and *Joshua Anderson*, and the survivors and survivor of them, and the heirs of such survivor, all his messuages, lands, and tenements situate at *Moorhouse*, *Orton*, and *Burgh*, in the said county of *Cumberland*, and all other his real estate whatsoever and wheresoever, subject to the life estate of his

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same persons as the trustees of the realty), in trust to apply it in payment of his debts, and then to invest the surplus, in their own names, in securities at interest, and to receive the interest, and pay and apply it for the use and benefit of his wife for life, in case she should so long continue his widow; and afterwards to apply the interest, or a sufficient part thereof, towards the maintenance and support of his daughter *Isabella*, until she should attain the age of twenty-five, and, as soon as she should attain that age, to pay and assign the principal and unapplied interest to her; but, in case she should happen to die before attaining the age of twenty-five, leaving lawful issue, then in trust to pay the same to such issue, share and share alike, if more than one, as soon as they should respectively attain their ages of twenty-one years, and to pay the interest towards their maintenance, education, and support in the mean time. But, in case his said daughter should happen to die under that age, and without leaving lawful issue, then he gave and bequeathed the whole of such surplus of his personal estate and effects unto Major *William Hodgson* (one of the trustees), and the testator's natural daughter *Jane Dalton Hodgson*, in equal shares, share and share alike.

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sister *Jane Hodgson* in his real estate at *Fauld*, and charged with the payment of the said annuity or rent charge, and also with so much of his just debts, legacies, funeral expenses, and costs of proving his will, as the residue of his personal estate and effects thereinbefore mentioned would not extend unto, upon the several trusts, and to and for the several uses, ends, intents, and purposes following, that is to say : — Upon trust to receive the rents and issues thereof, and to pay and apply the same from time to time, as and when the same should be received, unto the only proper use and behoof of the testator's wife *Mary*, during her life, in case she should so long continue his widow ; and, from and after her decease or marrying again, which should first happen, then “ upon trust to apply the said rents, issues, and profits towards the maintenance and support of my said daughter *Isabella*, until she shall attain the age of twenty-five years ; and, from and after her attaining that age, then upon trust, as to my real estate, subject and charged as aforesaid, for my said daughter *Isabella*, her heirs and assigns, for ever ; and I give and devise the same to her accordingly : but, in case it should happen that my said daughter *Isabella* depart this life without leaving issue lawfully begotten, then I give and devise the said messuages, lands, tenements, and real estate, unto the said Major *William Hodgson* and the said *Jane Dalston Hodgson*, their heirs and assigns, for ever, as tenants in common.” And the will provided that, if the said *J. D. H.* should, by virtue of the limitations thereinbefore contained and hereinbefore set forth, become entitled to any part of the said testator's said real estates, the annuity of 200*l.* thereinbefore given to her should cease. And the testator ordained

ordained that the trustees, for the performance of his will, and in order to raise money for the payment of his just debts, funeral expenses, and legacies, should and might, with all convenient speed after his decease, in case the said residue of his personal estate should be insufficient for that purpose, bargain, and sell, and alien in fee simple, any part of his said freehold messuages, lands, and tenements before mentioned; for the doing, executing, and perfect finishing. whereof, he gave to his trustees, and the survivors, &c., and the heirs, &c., full power and absolute authority to grant, alien, bargain, sell, convey and assure the same premises, or any part thereof, to any person or persons and their heirs for ever in fee simple, by all and every such lawful ways and means in the law as to his said trustees, or the survivors or survivor of them, or the heirs of such survivor, or to his or their counsel, should seem fit and necessary. And the testator authorised the trustees, and the survivors, &c., and the heirs, &c., to give receipts for purchase-monies, and did commit the management of the estates and fortunes of his said daughter to his said trustees and executors until she should attain the age of twenty-five years: and he appointed the said trustees executors of his will.

The testator died 21st *May* 1830, leaving his said daughter *Isabella* his heiress at law; and the will was duly proved. *Mary*, the wife of the testator, died in his lifetime. The personal estate not being sufficient for the payment of his debts, the trustees, in pursuance of the power or direction in that behalf, sold part of the real estate, including the premises devised to the testator's sister *Jane Hodgson* for her life.

By indentures of lease and release, bearing date respectively

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spectively 25th and 26th *January* 1832, the release being made between the said *Isabella Hodgson* (who had then attained the age of twenty-one years), of the first part, *William Higley*, gentleman, of the second part, and *George Saul*, gentleman, of the third part, for barring and extinguishing all estates tail of her the said *Isabella Hodgson*, of and in the hereditaments devised by the said will, and not sold as aforesaid, and the remainders and reversions thereon expectant or depending, and for assuring and limiting the same hereditaments in the manner in the said indenture of release and hereinafter mentioned, *Isabella Hodgson* conveyed to *William Higley*, his heirs and assigns, all those the messuages or tenements, &c., and premises thereinbefore referred to, and by the said will of *Richard Hodgson* devised to or in trust for the said *Isabella Hodgson*, her heirs and assigns, and not sold by the trustees as aforesaid, to hold the same, with the appurtenances, unto and to the use of the said *William Higley*, his heirs and assigns, for ever, to the intent that he might be immediate tenant of the actual freehold of the said hereditaments and premises, so that one or more good and perfect common recovery or recoveries, with double voucher, might be had and suffered of the same; in which recovery or recoveries *George Saul* was to be demandant, *William Higley* tenant, and *Isabella Hodgson* vouchee, who was to vouch over the common vouchee. And it was thereby declared that the said recovery, and all other recoveries whatsoever, of the said hereditaments (so far as *Isabella Hodgson* lawfully or rightfully might direct the uses thereof), should operate and enure to the only proper use and behoof of *Isabella Hodgson*, her heirs and assigns, for ever.

In

In pursuance of the said indentures, a common recovery was, in *Hilary* term 2 *W.* 4., duly had and suffered of the said hereditaments and premises.

By indentures of lease and release, bearing date respectively 9th and 10th *August* 1833, the release being made between *Isabella Hodgson*, of the first part, the defendant *David Ewart*, of the second part, *John Forster* and *Simon Ewart*, of the third part, and *George Saul* and *Silas Saul*, of the fourth part, in consideration of the marriage then intended and afterwards solemnised between *Isabella Hodgson* and the defendant, *Isabella Hodgson*, with the privity and approbation of the defendant, did convey to *John Forster* and *Simon Ewart*, and their heirs, the capital and other messuages, &c., therein mentioned and described (being the hereditaments devised by the will of *Richard Hodgson*, and not sold as aforesaid), with the appurtenances, to hold the same unto *John Forster* and *Simon Ewart*, and their heirs, to the use (from and after the solemnisation of the marriage) of *John Forster* and *Simon Ewart*, and their heirs and assigns, during the joint lives of *Isabella Hodgson* and the defendant, upon the trusts in the now-stating indenture of release declared; and, from and after the decease of *Isabella Hodgson*, or of the defendant, which should first happen, to the use of the survivor of them, and his or her assigns, for the term of his or her life, without impeachment of waste; remainder to the use of *John Forster* and *Simon Ewart*, and their heirs, &c. (to support contingent remainders); remainder to the use of the children or issue of the marriage, as the said *Isabella Hodgson* should by will appoint; and, in default of such appointment, to the use, &c. (certain estates limited in favour of the children
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of the marriage); and, in default of all issue of *Isabella Hodgson* by the defendant, to the use of *Isabella Hodgson*, her heirs and assigns, for ever.

By indenture, dated 9th *November* 1833, made between the defendant and *Isabella* his then wife (formerly the said *Isabella Hodgson*), of the one part, and *John Forster* and *Simon Ewart* of the other part, the said defendant covenanted and agreed that he and the said *Isabella* his wife (she thereby consenting) should and would, in or as of the then *Michaelmas* term, acknowledge and levy unto the said *John Forster* and *Simon Ewart*, and the heirs of one of them, one or more fine or fines sur conuzance de droit come ceo &c. of the hereditaments comprised in the said indenture of settlement, with their appurtenances: and it was thereby agreed that such fine or fines, and all other fines, conveyances and assurances of the same hereditaments, should operate and enure to confirm all the uses and trusts in the said indenture of settlement of 10th *August* 1833 contained, anterior to the limitation to the use of *Isabella*, then the wife of the said defendant, her heirs and assigns, and all the powers contained in the same indenture, and to assure the same hereditaments (subject as aforesaid) to such uses, upon such trusts, and for such intents and purposes, as the said *Isabella Ewart*, by her last will or testament in writing, or any codicil or codicils thereto, to be by her (notwithstanding her coverture, and whether covert or sole) signed and published, in the presence of and attested by three or more witnesses, should direct, limit, or appoint; and, in default of such direction, limitation, or appointment, and so far as any such direction, limitation, or appointment

ment

ment should not extend, to the use of *Isabella Ewart*, her heirs and assigns, for ever.

In pursuance of the lastly mentioned indenture a fine was, in or as of *Michaelmas* term 3 *W. 4.*, duly levied of the said hereditaments, and proclamations made thereon.

Isabella Ewart, by her last will and testament, or testamentary writing, dated 7th *January* 1834, signed &c. (in conformity with the power), in exercise of, and after reciting, the power given to her by the indenture of 9th *November* 1833, and the fine levied in pursuance thereof, and of every or any other power or authority enabling her in that behalf, did direct, limit, and appoint, that the several hereditaments situate at *Moorhouse*, &c., and all other the hereditaments of her the said *Isabella Ewart*, situate at or near *Moorhouse* aforesaid, or elsewhere in *Cumberland*, should, subject to such, if any, of the uses and trusts anterior to the power of appointment so given or reserved to her, as under or by virtue of the said indenture of 9th *November* 1833, and fine, were then subsisting, or should take effect, be and remain unto and to the use of her husband *David Ewart*, his heirs and assigns; and she did accordingly give and devise the same hereditaments unto and to the use of the defendant, his heirs and assigns, for ever.

Isabella Ewart died in *January* 1834, under the age of twenty-five years, without leaving any issue of her body, but leaving her husband the defendant her surviving.

It was contended, for the defendant, that either the trustees under the will of *Richard Hodgson* took the legal estate in fee simple absolutely, and that the gift over to the lessor of the plaintiff and *Jane Dalston Hodgson*, in case of the death, without leaving issue, of the

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the testator's daughter *Isabella*, was to be construed as meaning on an indefinite failure of issue, and consequently that she was equitable tenant in tail; or that (the testator's wife having died in his lifetime) the trustees took an estate only for so many years as the said *Isabella* should be under twenty-five, which was a chattel interest, and that the devise to her operated as an immediate gift to her of the legal estate of freehold for an estate tail: Or, if the trustees took an estate of freehold until *Isabella* attained the age of twenty-five years, the defect occasioned by their not concurring in making a tenant to the præcipe for the recovery suffered by her before her marriage was cured by stat. 3 & 4 IV. 4. c. 74. s. 11., which provides "that no common recovery already suffered" "shall be invalid in consequence of any person in whom an estate at law was outstanding having omitted to make the tenant to the writ of entry or other writ for suffering such recovery, provided the person who was the owner of or had power to dispose of, an estate in possession, not being less than an estate for a life or lives in the whole of the rents and profits of the lands in which such estate at law was outstanding, or the ultimate surplus of such rents and profits after payment of any charges thereout, and whether any surplus after payment of such charges shall actually remain or not, shall, within the time limited for making the tenant to the writ for suffering such recovery, have conveyed or disposed of such estate in possession to the tenant to such writ;" and that, consequently, the defendant's late wife, by the said recovery, acquired either the legal or the equitable fee-simple; and, she having died without issue, the defendant,
under

under and by virtue of the fine levied by him and his wife, and the declaration of the uses thereof, and of her said will, had acquired such fee simple in the hereditaments the subject of the present action.

It was contended, for the lessor of the plaintiff, that either the trustees under the will of *Richard Hodgson* took an estate of freehold in the devised hereditaments until his daughter *Isabella* attained the age of twenty-five years, with a power, only, to sell for the payment of debts and legacies, and, consequently, the recovery suffered by her was ineffectual to bar her estate tail (if any), by reason that the trustees did not join in making a tenant to the præcipe in that recovery, in which case the limitation over to the lessor of the plaintiff and *Jane Dalston Hodgson*, upon the death of the testator's daughter *Isabella*, had taken effect; or else that the said *Isabella* took an estate in fee simple in the devised hereditaments, subject to an executory devise over to the lessor of the plaintiff and *Jane Dalston Hodgson*, in the event of the said *Isabella* dying without issue under the age of twenty-five, or without leaving issue at the time of her death, although such death might take place after that age, and, consequently, that the recovery suffered by her was ineffectual to bar or destroy the remainder or estate by the said testator's will limited to the lessor of the plaintiff and the said *Jane Dalston Hodgson*, as tenants in common in fee simple.

The question for the opinion of the Court was, whether the lessor of the plaintiff was entitled to recover in this action a moiety under the devise to him and the said *Jane Dalston Hodgson*, as tenants in common in fee simple, of such of the hereditaments devised by the
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said will of *Richard Hodgson*, as were not sold by the trustees of his will.

If the Court should be of that opinion, then the defendant agreed that judgment should be entered against him by confession, immediately after the decision of this case, or otherwise, as the Court should think fit; and, if the Court should be of opinion that the lessor of the plaintiff was not entitled to recover such moiety in this action, then he agreed that judgment should be entered against him of nolle prosequi, immediately after the decision of this case, or otherwise, as the said Court might think fit.

The case was argued in *Easter* term last (a), by Sir *W. W. Follett* for the plaintiff, and Sir *F. Pollock* for the defendant (b).

Cur. adv. vult.

Lord DENMAN C. J. in this term (*January 31st*) delivered the judgment of the Court. After stating the nature of the action, the terms of the devise of the realty by *Richard Hodgson*, and the other principal facts, with the points put for the respective parties in the case, his Lordship proceeded as follows.

There are two principal questions in this case.

First, whether *Isabella Hodgson*, the daughter of the testator, took an estate in fee with an executory devise

(a) *April 25th, 1837.* Before Lord Denman C. J., *Littledale, Paterson, and Coleridge* Js.

(b) The principal point in the case being now, as to all wills made on or since 1st *January 1838*, regulated by stat. 7 *W. 4.* & 1 *Vict. c. 26.* s. 29., and the Court having entered very fully, in the judgment, into the authorities and argument, it is thought sufficient to refer the reader for these to the judgment and the notes.

over

over to Major *William Hodgson* and *Jane Dalston Hodgson*, or whether she took a vested estate tail with remainder over to the same persons? If she took an estate in fee with an executory devise over, then the Plaintiff (who is now called *Cadogan*, but in the will called *Hodgson*), who is one of the persons named in the devise over, is entitled to recover, because the recovery suffered by *Isabella Hodgson* could not bar the executory devise over.

But, if *Isabella Hodgson* took a vested estate tail with remainder over, then the second question will arise, whether the recovery suffered by her be a valid recovery sufficient to bar the remainder over?

On the first question, the words of the will, which give the estate to the testator's daughter, *Isabella Hodgson*, her heirs and assigns for ever, *primâ facie* import a devise in fee simple; and then the words which follow, "but, in case it should happen that my said daughter *Isabella* depart this life without leaving issue lawfully begotten, then I give the said messuages, lands, tenements, and real estate, unto the said Major *William Hodgson* and the said *Jane Dalston Hodgson*, their heirs and assigns, for ever, as tenants in common," would, according to the common and ordinary idiom and construction of the *English* language, independent of any technical rules which have been applied to the construction of legal instruments, imply that the devise over was to take place in the event of *Isabella* dying without issue which should be living at the time of her death.

But the law has prescribed certain limits for the validity of executory devises; and one of them is, that the contingency upon which an estate of this sort is

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permitted to take effect, shall happen within a short space of time, as a life or lives in being, and some few years, now settled at twenty-one years and the period of gestation; otherwise it would be in a testator's power to limit an estate unalienable for generations to come, a power which the law denies. And therefore, where an executory devise is limited to take effect after an indefinite failure of issue, the limitation over is void.

Under this rule, if the limitation be to take effect after a dying without heirs or without issue generally, that is considered to be an indefinite failure of issue, and therefore void. And the same rule holds in the limitation of a term or other personal estate, that a disposition to take effect after failure of the heirs of the body or dying without issue generally, without other restriction, is too remote; for the law will no more admit of a perpetuity in one sort of estate or species of property than in another.

But, with regard to executory devises of terms for years or other personal estates, the Courts have for a very considerable time very much inclined to lay hold of any words in the will to tie up the generality of the expression, *dying without issue*, and confine it to dying without issue living at the time of the person's decease. There are a great variety of cases, not necessary to be referred to, illustrating this position; and we may say, without any doubt, that the words of the present will would, if the question arose upon a term for years or other personal estate, now be held to mean a dying without issue living at the death of the daughter *Isabella*.

But, though the Courts, in the case of personal estates, generally incline to pay attention to any circumstance

cumstance or expression in the will that seems to afford a ground for construing a limitation after dying without issue to be a dying without issue living at the death of the party, in order to support the devise over, yet in the case of real estate it seems the construction is generally otherwise; and the reason given is, that the interest of the heir is concerned, who is said to be always favoured in our law.

In *Target v. Gaunt* (a) the expression dying without issue is recognised as having two senses: first, a vulgar sense, and that is, dying without leaving issue at the time of the death; secondly, a legal sense, and that is, whenever there is a failure of issue: and that there is a great diversity betwixt the devise of a freehold estate for life, and, if *A.* dies without issue, then to *B.*, and a devise of a term in the same words.

The case of *Forth v. Chapman* (b) establishes this distinction. There the testator gave the residue of his real and personal estate to two nephews, *W. G.* and *W. G.*, and, if either of them should depart this life and leave no issue of their respective bodies, then he gave the said [leasehold] premises to other persons; upon which the question arose, whether the limitation over of the leasehold premises was void as too remote? The Master of the Rolls, Sir *Joseph Jekyll*, was of opinion that the devise over was void, and said that, if the words had been, if *A.* or *B.* should die without issue, the remainder over, this plainly would have been void, and exactly like the case of *Love v. Windham* (c). And then he goes on to say "there is no diversity betwixt a

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(a) 1 P. W. 432. S. C. 1 Eq. Ca. Abr. 193. pl. 11. Gilb. Rep. Eq. 149. 10 Mod. 402.

(b) 1 P. W. 663. (c) 1 Sid. 450. S. C. 1 Vent. 79. 1 Mod. 50.

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devise of a term to one for life, and if he die without issue, remainder over, and a devise thereof to one for life, with such remainder, if he die leaving no issue; for both these devises seem equally relative to the failure of issue at any time after the testator's death." Afterwards, in *Trinity* term 1720, this case coming on before Lord *Parker* on an appeal, his Lordship reversed the decree, and said, that, "if I devise a term to *A.*, and if *A.* die without leaving issue, remainder over, in the vulgar and natural sense this must be intended if *A.* die without leaving issue at his death, and then the devise over is good; that, the word *die* being the last antecedent, the words *without leaving* issue must refer to that." Lord *Parker* also observed, "that by this will the devise was of a freehold as well as a leasehold estate to *William Gore*, and, if he or *Walter* died leaving no issue, then to the children of his brother and sister, in which case it was more difficult to conceive how the same words, in the same will, at the same time, should be taken in two different senses. As to the freehold, the construction should be, if *William* or *Walter* died without issue *generally*, by which there might be *at any time* a failure of issue; and, with respect to the leasehold, that the same words should be intended to signify their dying without leaving issue *at their death*. However," the Lord Chancellor said, "it might be reasonable enough to take the same words, as to the different estates, in different senses, and as if repeated by two several clauses." Mr. *Peere Williams*, in a note on this case, says that by the will, as it is stated above, from the registrar's books, in the statement of the case at the Rolls, and on the appeal, the limitation over was expressly restrained to the *leasehold*; but in Lord *Macclesfield's* notes

notes that word is omitted, and the devise over is general: but in *Sheffield v. Lord Orrery* (a) Lord *Hardwicke* says that Mr. *Williams* is mistaken in this note; "for, upon looking into the case, it appears that both freehold and leasehold were devised by the same words; but probably the limitation of the real was overlooked, and so omitted by the register."

The words in that case are in effect the same as in the present; the words there being, if the nephews should die and leave no issue of their respective bodies; and, in the present case, if it should happen that my daughter "depart this life without leaving issue lawfully begotten." It will be to be considered how far the case of *Forth v. Chapman* (b) has been recognized or impugned in other cases.

In *Sheffield v. Lord Orrery* (c), before cited, Lord *Hardwicke* recognises the doctrine of Lord *Macclesfield* in *Forth v. Chapman* (b), that the same words may have different constructions to effectuate the intention of the party.

In *Walter v. Drew* (d), where the will was that, if *W.*, the son of the testator, should happen to die and leave no issue of his body lawfully begotten, then, after the death of *W.*, he gave and bequeathed all his lands of inheritance to his son *Richard* and his heirs, it was held that *W.* took an estate tail by implication, which was barred by the recovery; and that the limitation over was a remainder, and not an executory devise. The authority of that case is also confirmed by Lord *Hardwicke* in *Southby v. Stonehouse* (e), where, in page 616,

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(a) 3 Atk. 288.

(b) 1 P. W. 663.

(c) 3 Atk. 282.

(d) 1 Com. Rep. 372.

(e) 2 Ves. sen. 611.

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he says, "The only objection to this construction is, that this will not construe the words according to her expression in the former clause, but puts a different construction upon the same words in two different events. Now that that may be done, there are authorities, and in a much stronger case, viz. *Forth v. Chapman* (a); where the greatest difficulty in the way of Lord *Macclesfield* was, that the freehold and leasehold were devised by the same words: and yet he held, those words were to receive a construction according to the subject matter." And he again repeats what he had done in *Sheffield v. Lord Orrery* (b), that there was a mistake in Mr. *Williams's* note, as to the limitation in *Forth v. Chapman* (a), for that he, Lord *Hardwicke*, was counsel in the cause.

In *Denn dem. Geering v. Shenton* (c), the devise was to *Samuel Shenton* and the heirs of his body and their heirs for ever, chargeable with the payment of 8l. a year; but, in case the said *Shenton* should "die without leaving issue of his body, then I give" the said devised premises to *William G.* and his heirs for ever. Lord *Mansfield* asked Mr. *Cowper* if he had any case to shew, where, upon a limitation of *lands* upon a dying without issue, these words had been confined to a dying without issue living at the time of the death. The distinction is taken "between a devise of lands and personal estate: in the latter case, the words are taken in their vulgar sense; that is, *dying without leaving issue at the time of his death*. In the former, they are taken in a legal sense; and that is, *whenever there is a failure of issue*." Lord *Mansfield* said, "the question is, whether the

(a) 1 P. 663.

(b) 3 Atk. 288.

(c) 1 Cowp. 410.

grandson

grandson took an estate tail, or an estate in fee? Now the devise is to *Samuel Shenton*, and *the heirs of his body*, and *their heirs for ever*; but the words '*their heirs for ever*,' are qualified by the subsequent words, '*in case he shall die without leaving issue*,' which clearly shew it to be an estate tail; and then, the testator gives it over to the lessor of the plaintiff;" and he adds, "it is too clear to admit of a doubt." There the words were *without leaving issue*.

In *Goodtitle dem. Peake v. Pegden (a)*, which was the devise of a chattel interest, Lord *Kenyon* relies upon the case of *Forth v. Chapman (b)*, without any objection.

In the case of *Daintry v. Daintry (c)* Lord *Kenyon* recognizes the case of *Forth v. Chapman (b)*.

In *Tenny, dem. Agar v. Agar (d)* the devise was to the devisor's son *John Agar*, and his right heirs for ever, on condition of paying certain sums to his daughter; "and, *in case my said son and daughter* both happen to die *without leaving any child or issue*," then he devised the reversion and inheritance to his cousin *Richard*, and his right heirs for ever. *John Agar* suffered a recovery; and the question was, whether he took an estate tail, or whether there was a valid executory devise to *Richard*? The Court held that *John Agar*, the son, took an estate tail, which was well barred by the recovery; and Mr. Justice *Le Blanc* said there was no case where the words "die without *leaving issue*," simply, have been adjudged to mean "without leaving issue *at the time of the death*:" and he added, "in *Porter v. Bradley (e)* there were also the words *behind him*."

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(a) 2 T. R. 720.

(b) 1 P. W. 663.

(c) 6 T. R. 307.

(d) 12 East, 253.

(e) 3 T. R. 143.

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In *Dansey v. Griffiths* (a) *Richard Dansey* devised his estates to his eldest son, *Dansey Richard Dansey*, and his heirs for ever; but, if it should so happen that his eldest son should die and leave no issue, then he devised his estates to his son, *W. Dansey* and his heirs; and, if he should die without issue, then to his son *E. C. Dansey*; and, in the like case, to his son *G. H. D.*; and, in the like case, to his son *J. D.*; and, in failure of issue from him, to the eldest surviving son of his sister *Mary* and his heirs. The testator died, leaving his eldest son surviving him: and the question sent by the Master of the Rolls was, what estate the eldest son took. And the Court certified their opinion that the eldest son, *D. R. Dansey*, took an estate tail under the will.

There is also the case of *Doe dem. Ellis v. Ellis* (b). The testator devised to his eldest son *Joseph*, his heirs and assigns for ever, the estate in question; but, in case his son *Joseph* should die without issue, he devised the same to the child or children with which his wife was enseint, his or her heirs and assigns for ever; and it was held that *Joseph* took an estate tail.

There is also the case of *Brice v. Smith* (c), which was referred to by Lord *Ellenborough* in *Doe dem. Ellis v. Ellis* (b). There the testator devised the premises to his son *Philip* and his heirs for ever, and other estates to other sons and their heirs; and then he adds, "in case any of my said children" "*shall die without issue*, then I give the estate of him or them so dying unto his or their right heirs for ever:" held an estate tail.

And also *Roe v. Scott* in Mr. *Fearne's* manuscripts, and which is published in the notes of *Butler's* edition (d):

(a) 4 M. & S. 61. (b) 9 East, 382.

(c) *Willes*, 1. (d) *Fearne's Cont. Rem.* 473. note (c), 9th ed.

there

there the testator devised certain lands to his son *James*, and his heirs and assigns for ever; and other lands to his son *John*, and his heirs and assigns for ever; and other lands to his son *Thomas*, and his heirs and assigns for ever: and, if either of his sons should depart this life without issue of him so dying, then to the survivor; and, if they should all die without such issue, then to his daughters and their heirs and assigns for ever: held an estate tail in *Thomas*.

But none of those three last cases have the words *leaving* issue; and it is beyond all doubt that, if a man devised in such manner as in these three cases, the words, *if he die without issue*, in legal construction mean an indefinite failure of issue: and the same words also without more words, even in personal estates, import an indefinite failure of issue.

In opposition to these cases are *Porter v. Bradley* (a) and *Roe dem. Sheers v. Jeffery* (b), both decided in this Court while Lord *Kenyon* was Chief Justice, and which are particularly entitled to attention from the very great knowledge which that learned Lord possessed upon all matters relating to real property.

In the case of *Porter v. Bradley* (a) the testator devised to his son *Philip Dobin*, his heirs and assigns for ever, all that messuage, &c.; “but my will is that in case my said son *Philip Dobin* shall happen to die *leaving no issue behind him*, then my said wife” “shall receive and take the rents, issues, and profits” during her widowhood; “and after her decease,” “I give and devise the same, for want of issue” “as aforesaid, unto my son *James Dobin*, his heirs and assigns for ever;” “but in case

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(a) 3 T. R. 143.

(b) 7 T. R. 589.

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my son *James Dobin* shall happen to die before my son *Philip*, and the said *Philip* shall not leave any issue of his body begotten, then my will is, that my said lands shall be sold, and equally divided between my six daughters" "and their issues." One question was, what estate *Philip Dobin* took under the will of his father? Lord *Kenyon*, after stating the words of the devise, says, "The first question that arises in this case is, whether this is an estate tail or in fee? The first part of the devise to *Philip Dobin* *prima facie* carries a fee; for it is to him, his heirs, and assigns for ever: but it is clear that those words may be restrained by subsequent ones so as to carry only an estate tail. And a long string of cases may be cited in order to shew that where an estate is limited to a man and his heirs for ever, and, if he die without leaving heirs, then to his brother, or to any person who may be his heir, those words shall not have their full legal operation, but shall be restrained to heirs of a particular kind, namely, *heirs of the body*. If the subsequent part of this devise had been 'and in case he shall die without heirs, then over,' it would have given to *P. Dobin* an estate tail, which he might have barred by the recovery. But here the words are 'but in case he shall happen to die, *leaving no issue behind him*;' which makes a very material difference, and brings it within the case of *Pells v. Brown* (a) which is the foundation, and as it were the *Magna Charta* of this branch of the law. This question arose soon after executory devises were first taken notice of, which was in the reign of Queen *Elizabeth*. And that doctrine has never been since doubted by the courts of law.

(a) Cro. Jac. 590.

But

But the defendant's counsel has attempted to distinguish this case from that of *Pells v. Brown* (a); because there the words are 'If *Thomas* (the first devisee) died without issue, *living William* his brother:' but it is to be observed that there are words in this case" (*Porter v. Bradley*) "equivalent to those, namely, 'If *P. Dobin* shall die, leaving no issue *behind him*.' If indeed only the first words 'leaving no issue' had been used, they, according to the opinion of Lord *Macclesfield* in *Forth v. Chapman* (b), must be restrained to leaving issue at the time of his death. But it is contended, that rule is confined to chattel interests only:" yet "it would be very strange if these words had a different meaning when applied to real and personal property. If such a distinction existed in the law, it certainly would not agree with the rule *lex plus laudatur quando ratione probatur*: but it is not founded in law. And there are even additional words in this case, 'leaving no issue *behind him*;' which necessarily import that the testator meant at the time of his son's death. The subsequent parts of the will also convey the same idea:" and then he states the other parts of the will. The Court of King's Bench certified to the Court of Chancery that *Philip Dobin* took an estate in fee simple in the premises above devised to him: but, as *Philip* died without issue living at the time of his death, they were of opinion that the further disposition made by the testator in that event was good by way of executory devise.

In *Roe dem. Sheers v. Jeffery* (c) the testator devised the premises in question to his wife for life; after her decease, to his daughter for life; after her decease, to

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(a) *Cro. Jac.* 590.(b) 1 *P. W.* 668.(c) 7 *T. R.* 589.

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his grandson and his heirs for ever; but, in case his grandson should *depart this life and leave no issue*, then that the premises should be and return unto the three daughters of *W. and M. Friswell*, or the survivor or survivors of them, to be equally divided betwixt them, share and share alike. The question was, whether the grandson took an estate tail, or an estate in fee with an executory devise over. Lord *Kenyon* made the same remark as in *Porter v. Bradley (a)*, "That the very same words in the same clause in a will, should receive one construction as applied to one species of property, and another construction as applied to another," not being "reconcilable with reason:" but he added, "that if it had become a settled rule of property, it might be dangerous to overturn it." The case stood over; and Lord *Kenyon*, in giving the judgment of the Court, said that, in looking through the whole of the will, the Court had no doubt but that "the testator meant that the dying without issue, was confined to a failure of issue at the death of the first taker; for the persons to whom it is given over were then in existence, and life estates are only given to them;" and that there was no doubt about the testator's intention. And it was held that the devise over was a good executory devise.

In *Doe dem. Barnfield v. Wetton (b)* the testator devised the premises in question to his wife for her life, and, after her death, his freehold and leasehold premises to *Francis Barnfield*, his heirs, executors, and administrators, upon trust to permit his son *John* to take the rents and profits for his life; and, after his

(a) 3 T. R 143.

(b) 2 B. & P. 324.

death,

death, upon trust for all the sons and daughters of his son *John* and their heirs; and, after the death of his wife, he devised his copyhold premises to his daughter *Susannah*, her heirs and assigns for ever: but, if his daughter should happen to die leaving no child or children, lawful issue of her body, living at the time of her death, then he devised the premises to *Francis Barnfield* and his heirs, upon trust &c. It was held to be an executory devise; and it seems quite clear it must be so; because the dying without issue was limited to the life of *Susannah*, the daughter, and therefore fell within the case of *Pells v. Brown* (a) and other similar cases.

In the case of *Crooke v. De Vandes* (b) Lord *Eldon* thus expresses himself, in page 203. "When I read the case of *Porter v. Bradley* (c), speaking with all due deference to the learned Judge, who expressed that *dictum*, it appeared to me, that it went to shake settled rules to their very foundation. I had heard the case of *Forth v. Chapman* (d) cited for years, and repeatedly by Lord *Kenyon* himself, as not to be shaken. I never knew it shaken; and if *Porter v. Bradley* (c) has not since been disturbed in the Court of King's Bench, upon the principle, expressed by Lord *Alvanley* in *Campbell v. Campbell* (e), against shaking settled rules, I will not add to the authority of that *dictum*."

In *Elton v. Eason* (g) Sir *William Grant*, the Master of the Rolls, thus begins his judgment: "There is no reason, why the same words may not be differently construed, when they apply to different descriptions of pro-

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(a) *Cro. Jac.* 590.(c) 3 *T. R.* 143.(e) 4 *Br. C.* 18.(b) 9 *Ves.* 197.(d) 1 *P. W.* 663.(g) 19 *Ves.* 77.

perty,

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perty, governed by different rules." And, in another part, he says "the case of *Crooke v. De Vandes* (a), in which the Lord Chancellor expresses his opinion very strongly in favour of the distinction in *Forth v. Chapman* (b) (and Lord *Hardwicke* has repeatedly recognised it) appears to be just as strong as this."

After these remarks of Lord *Eldon* and Sir *William Grant*, we cannot consider the case of *Porter v. Bradley* (c) to have overturned the case of *Forth v. Chapman* (b), and the more so, as, since that case, there have been the two cases of *Tenny dem. Agar v. Agar* (d), and *Dansey v. Griffiths* (e), in this Court, above cited, directly the other way. And, if the case of *Porter v. Bradley* (c) be supportable at all, it can only be on the ground of the words *behind him* being introduced after the words *leaving no issue*; and which distinction is observed upon by Mr. Justice *Le Blanc* in his judgment in *Tenny dem. Agar v. Agar* (d). And, with regard to *Roe dem. Sheers v. Jeffery* (g), that case, if supportable at all, can only be so on the ground of the devise over being of life estates. In *Barlow v. Salter* (h) Sir *William Grant* says that in *Roe dem. Sheers v. Jeffery* (g) the devise over was only of life estates, and on that ground Lord *Kenyon* compared it to *Pells v. Brown* (i).

We have made these remarks, as applicable to the words of the will, as we do not think that there are any parts of it which shew any intention to be inferred different from what the words import in their general legal signification; and, upon the whole, we come to the con-

(a) 9 *Ex.* 197.(c) 3 *T. R.* 143.(e) 4 *M. & S.* 61.(h) 17 *Ex.* 483.(b) 1 *P. W.* 663.(d) 12 *East*, 253.(g) 7 *T. R.* 589.(i) *Cro. Jac.* 590.

clusion

clusion that, as the case originally stood, the daughter *Isabella* took an estate tail. If indeed the words of the will had been, *but in case it should happen that my said daughter Isabella depart this life before she shall attain the age of twenty-five years, and without leaving issue lawfully begotten*, the addition of the words *before she shall attain the age of twenty-five years, and* might have varied the case; and it might be contended that these words would make it a dying without leaving issue living at the time of the death before twenty-five. However, there are not any similar words in the will, and the former part of the will does not import them; for, though *Isabella* is not to enter into the receipt of the rents and profits till she attains the age of twenty-five years, yet the devise over is not to depend at all upon her dying under that age, but on her leaving issue. And it is not necessary to consider the cases referred to in the argument on that point. When the age to which a person is to attain, and the dying without issue, are to form the basis of the devise over, sometimes the word *and* is mentioned, and at other times the word *or*, and the reasoning is formed upon those words: but here is the total absence of one of the branches.

So far we have commented upon the will as originally set out in the case. But the Court, when this case was first begun to be argued, directed the whole will to be introduced into and to form part of the case. And by the will, as fully set out, after bequeathing his household furniture, &c., to his wife, he gives the residue &c. (his Lordship here read the bequests of the personalty (a)). It will be seen by that, the testator makes

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(a) *Antè*, p. 636, note (a).

a provision

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a provision as to his daughter dying under twenty-five years of age, and without leaving issue; which shews that he knew what would be the effect of those words; and, therefore, from his silence when he comes to the limitation of the real estate, where no such words or any words of similar import are introduced, it seems to follow that he did not mean that they should be taken into consideration; and that the words must speak for themselves, according to their general legal import. And, therefore, the objection to the same words being construed in two different senses, as to the real and personal estate, does not apply to the present will.

It has been argued in one of the former cases, *Dancy v. Griffiths* (a), that in *Forth v. Chapman* (b), and most of the other cases cited as to this point, where the subsequent words on which the remainder over was limited were held to give an estate tail to the first taker, the estate was limited to the first taker indefinitely, and not by words of inheritance. But, notwithstanding that, the Court held in the case that the first taker had an estate tail: and in several of the cases above cited there were words of inheritance in the estate of the first taker: and the Courts have never gone upon any distinction of that sort.

And, upon the whole, we come to the conclusion that the daughter *Isabella* took an estate tail (c).

(a) 4 M. & S. 64.

(b) 1 P. W. 663.

(c) On this point, the following authorities were cited in argument, besides those mentioned in the judgment: *Pryddall v. Pryddall*, 1 P. W. 745; *Down v. Pennyp.* 1 Mer. 30; *William v. Smeal*, 7 T. R. 553; *Prior v. Hunt*, Polleg. 645; *Fassman v. Baker*, 1 Tins. 174; *Glover v. Manckton*, 3 Bing. 13; *Read v. Smeal*, 2 Atk. 645; 2 Powell on Devises, 305, 3d (Jarman's) ed.; *Murray v. Ashcroft*, 4 Russ. 407.; *Bradshaw v. Skilbeck*, 3 New Cas. 152.

Then,

Then, assuming that *Isabella* took an estate tail, another question is, whether the estate tail be vested in her before she attains the age of twenty-five years.

In *Boraston's Case* (a) the testator devised to *Thomas Amery* and his wife the premises in question for eight years, and after the said term to remain to his executors until *Hugh Boraston* should attain his age of twenty-one years, "and the mesne profits to be employed by my executors towards the performance of this my last will;" and, when the said *Hugh* shall attain the age of twenty-one years, "then I will that he shall enjoy" the premises "to him and to his heirs for ever." *Hugh Boraston* died at the age of nine years. The Court said (b) the case at bar was no other in effect, but that a man devises his lands to his executors for the payment of his debts, until his son shall have come to his full age of twenty-one years, remainder to his son in fee: "for although these are adverbs of time, 'when,' &c. 'and then,' &c. yet they do not amount to make any thing precede the settling of the remainder, no more than in the common case."

In *Mansfield v. Dugard* (c) the testator devised to his wife till his son should attain the age of twenty-one years, and, when his son should attain the age of twenty-one years, then to his son and his heirs: his son died at the age of thirteen years; and it was held that the wife's estate determined at his decease, and that the remainder vested in the son upon the testator's death, and did not expect the contingency of his attaining twenty-one years.

In *Goodtitle dem. Hayward v. Whitby* (d) the testator

(a) 3 Rep. 19 a.

(b) Fol. 21 a.

(c) 1 Eq. Ca. Abr. 195. pl. 4.

(d) 1 Bur. 228.

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devised the premises in question to trustees and their heirs, in trust to lay out the rents and profits for the maintenance of his nephews during their minorities, and, when and as they should attain their ages of twenty-one years, to remain to them and their heirs. It was held that the nephews took the fee immediately.

In *Denn dem. Satterthwaite v. Satterthwaite* (a) *Clement Satterthwaite* devised the premises to *William Satterthwaite* his fourth son, for the use of *William Satterthwaite*, the son of the said *William*, for his maintenance and education, till he attained the age of twenty-one years; after which he devised the same to *William Satterthwaite*, the grandson, and his heirs. The Court was clear that *William*, the father, was only in the nature of a guardian to *William*, his son, and that the fee simple vested instantly in *William*, the son.

In *Doe dem. Wheedon v. Lea* (b) the testator devised the premises to *Thomas Lea* and *Edward Johnston*, their heirs and assigns, to hold them to them and their heirs until *Michael Lea*, then an infant of thirteen years of age, should attain the age of twenty-four years, on condition that they should, out of the rents and profits, during all that time, keep the buildings in repair; also he devised to the said *Michael Lea*, his heirs and assigns for ever, when and so soon as he should attain his age of twenty-four years, the premises in question, and directed the trustees to surrender the premises accordingly. *Michael Lea* attained the age of twenty-one years, but died under the age of twenty-four years. Lord *Kenyon* said, "The only question is, whether, in the event of *Michael Lea* dying before he attained his age of twenty-

(a) 1 W. Bl. 519.

(b) 3 T. R. 41.

four,

four, this was a vested interest in him, descendible to his heir at law." "And I conceive that there can be no doubt on this question. It has been argued, that it depended on a condition precedent, and that not having happened, that the estate never vested in *Michael Lea*." "The only case cited in support of it is that of *Brown-sword v. Edwards* (a): but it must be remembered that the words there are very different from the present. There it was 'if he should attain the age of twenty-one:' but the words in this case only denote the time when the beneficial interest was to accrue." The other two Judges in Court, Mr. Justice *Ashhurst* and Mr. Justice *Grose*, gave their opinions in the same effect.

There is also on this point the case of *Doe dem. Morris v. Underdown* (b).

We think these cases quite sufficient to shew that the estate tail of *Isabella* was vested on the death of the testator, her mother having died in his life-time (c).

We may here observe that this may perhaps be the last time of the question, as to the effect of dying without issue, being agitated: for, by the act 7 W. 4. & 1 Vict. c. 26. s. 29., which takes effect at the beginning of this year, all these expressions of "die without issue," or "die without leaving issue," or any other words which may import a failure of issue, shall be construed to mean a want or failure of issue in the life-time of the party; and therefore the fifty-seven cases alluded to by Lord *Ellenborough*, in *Doe dem. Ellis v. Ellis* (d), as having been mentioned by Lord *Thurlow* in

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(a) 2 Ves. sen. 243.

(b) *Willes*, 293.(c) On this point, *Driver dem. Frank v. Frank*, 3 M. & S. 25., was cited in argument, besides the authorities mentioned in the judgment.

(d) 9 East, 386.

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Bigge v. Bensley (a), as having occurred on this head, as well as several others since that time, may be considered as out of our reports, except as to wills made before the present year.

The second question is, assuming *Isabella* to have a vested estate tail, whether the recovery suffered by her was sufficient to bar the estate tail: and, to do that, it is necessary to consider what estate the trustees took under the will. This Court had occasion, a short time ago, to consider the question, what estate trustees took under a will, in the case of *Doe dem. Shelley v. Edlin* (b); in which they adopted the rule laid down by Mr. Justice Bayley and Mr. Justice Holroyd in *Doe dem. Player v. Nicholls* (c), where Mr. Justice Bayley says, that "It may be laid down as a general rule, that where an estate is devised to trustees for particular purposes, the legal estate is vested in them as long as the execution of the trust requires it, and no longer, and therefore, as soon as the trusts are satisfied, it will vest in the person beneficially entitled to it." And Mr. Justice Holroyd, in the same case, says that "A trust estate is not to continue beyond the period required by the purposes of the trust." But the Court goes on (d) to say that, "if the rules above mentioned, as laid down by these Judges, be confined so as to say that the trustees originally take only that quantity of interest which the purposes of the trust require as far as is expressed by the words used in the instrument itself, or by the apparent intention of the maker of the instrument consistent with the language of it, then I

(a) 1 Br. C. C. 130.

(b) 4 A. & E. 532.

(c) 1 B. & C. 336.

(d) *Doe dem. Shelley v. Edlin*. 4 A. & E. 539.

admit

admit the rule to be correct. But if it be meant to apply to all cases in general where the trusts are no longer capable of being carried into effect, but yet the instrument, by the legal construction of it, already gave an estate which might continue for a longer period than that during which the objects of the trust had an actual existence, then that in my mind will admit of a different consideration. I admit that, for a great number of years past, the Courts have held that trustees take that quantity of interest which the purposes of the trust require; and the question is, not whether the maker of the instrument has used words of limitation or expressions adequate to convey an estate of inheritance, but whether the exigencies of the trust require a fee, or can be satisfied by a less estate." We acquiesce in what the Court there said; and we will now consider what estate the trustees took under the will, as qualified by the rule laid down in that case.

The first thing to notice is the interest they took before *Isabella* attained her age of twenty-five years: that was only an estate for years, determinable upon her attaining that age or dying before; and that was not a freehold, but a term of years; and it would not prevent *Isabella* from suffering a recovery, as she had the first immediate estate of freehold; and as the devise to her gave her the legal estate as far as the mere devise to her went, that would be a legal recovery. Another trust, imposed upon the trustees by the will, is to pay the rents and profits of the estate to the wife of the testator for her life, or during her widowhood: that would give them a freehold interest in the estate; but, as she died in the lifetime of the testator, it never took effect. And, as the duration of their estate for that purpose is limited

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by the will, it would fall within the general rule that, the object ceasing, the estate of the trustees ceases also. We do not enter into any consideration, whether the words in the will would give the legal estate to the trustees; but, if it did not, the wife of the testator would have had the legal estate; but, the estate being gone altogether, it is no objection to the recovery. The next thing is the annuity to *Jane Dalston Hodgson*. If an annuity be left charged upon the real estate, and the estate be devised to trustees, that alone does not give the legal estate to the trustees; but, if they are directed to pay the annuity, then they have the legal estate for that purpose. This is fully illustrated by Lord *Alvanley* in *Kenrick v. Lord W. Beauchlerk (a)*, as to payment of debts; and annuities stand upon the same footing. And then, inasmuch as the will directs the trustees to pay the annuity, there appears to be an estate of freehold in the trustees which precedes the estate of *Isabella* the daughter, and consequently would prevent her suffering a valid recovery. The next trust to be noticed is, that the trustees are to sell to pay debts, in case of deficiency of the personal estate. It appears from the case there was such deficiency; consequently, the trustees had an estate in fee to enable them to sell: and they have, in fact, sold part of the estates accordingly: and I presume (though it is not so stated in the case) that they have sold enough to pay the debts, and that, therefore, there does not remain any thing more to be done by them in that respect. Then a question arises, whether, as the objects of that part of the trust have been performed, there was any estate remaining in the trus-

(a) 3 B. & P. 175.

tees which had been created for the purposes of this trust; and, therefore, it might appear, according to the case of *Doe dem. Player v. Nichols* (a), that, the object of the trust being performed, the estate of the trustees in fee-simple should cease also: but, inasmuch as the power of the trustees as to this arose upon a contingency, and that contingency has happened, they had a full power to sell any part of the premises: and then, as the will does not confine their power to sell so much as should be sufficient to pay the debts, and also as there is no devise over of such parts as should remain unsold, we are of opinion that the trustees retained the fee-simple created by the will in the whole of the estates of the testator, according to the qualification of the rule in *Doe dem. Shelley v. Edlin* (b).

It is true that the beginning of the language of the power to sell says *any part* of the estate, and does not say the *whole* or any part; but the latter part of the power says *the same premises or any part thereof*; and we think the legal effect of this, taken altogether, is to extend the power over the whole. The case of *Warter v. Hutchinson* (c) was, in some respects, the same, as to the limitations, as the present; and, though there was a devise in fee to the trustees, this Court held they only took a chattel interest; but the limitations were very complicated, and we consider the decision as having turned on the particular circumstances, and not on the general point of the trustees taking the fee. And we do not think that case sufficient to vary what we

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(a) 1 B. & C. 336.

(b) 4 A. & E. 582.

(c) 1 B. & C. 721.; and see *Warter v. Hutchinson*, 2 Br. & B. 349.

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consider the general principle, so as to give a chattel interest only to the trustees (a).

Then, as the trustees, in our opinion, have a general fee simple in the whole of the estate, it is to be considered how that affects the recovery; and, upon that, we think such fee simple absorbs the freehold which they had for the payment of the annuity to *Jane Dalston Hodgson*, though not as a regular merger, and that the case is to be considered as upon the estate in fee being in the trustees; and, upon that, that they have the legal estate in fee. And *Isabella* has an equitable estate in tail; and therefore she may suffer an equitable recovery, which will have the effect of barring all equitable remainders over, though it would not bar legal remainders.

Then, is the remainder to the lessor of the plaintiff and *Jane Dalston Hodgson* a legal or an equitable remainder? We are of opinion that it is an equitable remainder. It is of the same quality in that respect as the estate to *Isabella*; and the trustees have the legal estate; and therefore the remainder over is barred.

We are of opinion, therefore, that the lessor of the plaintiff is not entitled to recover; and the judgment will be entered as agreed in the case.

Nolle prosequi entered.

(a) On this point, *Doe dem. White v. Simpson*, 5 Ezst, 162, was cited in argument, besides the authorities mentioned in the judgment.

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The QUEEN *against* The Company of Proprietors
of the Canal Navigation from LEEDS to
LIVERPOOL.

Thursday,
January 11th.

ON appeal against a poor-rate for the parish of *Liverpool*, whereby *The Company of Proprietors of the Canal Navigation from Leeds to Liverpool* were rated for their lands, canal navigation, warehouses, sheds, house,

By stat.
10 G. 3. c. 114.
the company of
proprietors of
the canal na-
vigation from
Leeds to Liver-
pool were in-

corporated and empowered to make a canal, with towing paths, wharfs, quays, &c., and to impose tolls and duties; and it was enacted that the tolls, &c., should at all times thereafter be exempted from the payment of any taxes, rates, assessments, or impositions, other than such as the land which should be used for the purpose of the navigation would have been subject to if that act had not been made.

Stat. 23 G. 3. c. 47. (for incorporating another navigation with the canal, and for amending the preceding act) enacted that the several navigations, cuts or canals, and the tolls, &c., to be taken on the same, should at all times be exempt from the payment of any taxes, rates, assessments, or impositions, other than such as the land which had been or should be used for the purpose of such navigations, &c., were or would have been subject to if that act had not been made; and that such navigations, cuts, or canals, should not be subject to the payment of any taxes, &c., except such as had been and then were usually charged and assessed thereon; but this was not to exempt any quay, wharf, warehouse, or other house; and the clause in the previous act, exempting the tolls, &c., from taxes, rates, &c., was declared to be repealed.

Stat. 59 G. 3. c. cv. (local and personal, public), for enabling the company to make additional cuts, &c., declared that the clauses, powers, provisions, limitations, restrictions, exemptions, matters, and things, contained in the former acts (except such as had before been repealed, or were by that act repealed or altered), should extend to the purposes of that act as if re-enacted; and that the lands, dwelling houses, wharfs, quays, warehouses, lock houses, and other houses of the company, should be rateable to the poor, the lands according to the quantity and quality, and the dwelling houses, wharfs, quays, warehouses, lock houses, and other houses, according to the nature and respective uses, dimensions, and descriptions thereof, and should be assessed in like manner as lands of a like quality, and as dwelling houses, warehouses, lock houses, and other houses of like and similar size, nature, dimension, or description, in the respective parishes, &c., where the same should be situate, were or should be assessed and charged; the rates, duties, and other personal property of the company to be assessed as other personal property in the said parishes, &c.

Held, on a case stated as to poor-rate in the parish of *Liverpool*, where no personal property was assessed to the poor,

1. That the land occupied by the canal, basins, and towing paths, being part of the original line, was to be rated according to the general value borne *at the time of the rate* by the land immediately adjoining, not excluding the value which such land derived from the vicinity of the canal, but not reckoning the value which such land would acquire if applied to the purposes of a canal.

2. That the land occupied by cuts and basins not being in the line prescribed in any of the acts was to be rated on the same principle.

3. That wharfs and quays adjacent to the last mentioned cuts and basins were to be rated as similar property adjacent, not excluding the value which such adjacent property derived from the vicinity of the cuts and basins.

stables,

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stables, cranes, weighing machines, branches, basins, cuts, and wharfs, at 3400*l.* (a), the sessions confirmed the rate, subject to a case which was substantially as follows.

By stat. 10 G. 3. c. 114. s. 1. the company were incorporated under the above name; and it was enacted, that the company “shall and may have power and authority to purchase lands for the use of the said navigation,” and to make and complete a cut or canal, navigable and passable for boats, barges, and other vessels, from or near *Leeds* bridge, in *Leeds*, through the township of *Leeds*, and through the said several townships, parishes, or hamlets of *Holbeck*, &c.; and *Foulridge*; &c., and to or near *The North Lady’s Walk*, in the town or port of *Liverpool*, and from thence to communicate with the river *Mersey*; and supply the said cut or canal, whilst the same shall be making and when made, with water from such springs, &c. (describing the limits of the privilege); and also to make such reservoirs as shall be necessary for the purposes of the said cut or canal, “and to bore, dig, cut, trench, sough, remove, take, carry away, and lay earth, soil, clay, stone, rubbish, trees, roots of trees, beds of gravel or sand, or any other matters and things which may be dug or got in the making of the said cut or canal, or out of any lands or grounds of any person or persons adjoining or lying contiguous thereto, and which may be proper” for the completing the canal, &c.; “and also to make, build, erect, and set up, in or upon the said intended cut or canal, or upon the lands adjoining

(a) It did not distinctly appear how this sum was made up; but it was agreed that the opinion of the Court should be asked as to all the principles proposed for rating the several species of property.

or near the same respectively, such and so many bridges, tunnels, aqueducts, sluices, locks, weirs, pens, water-stanks, reservoirs, drains, wharfs, quays, landing places, weigh-beams, cranes, and other works, ways, and conveniences, as and where (except as before excepted) they the said proprietors shall think requisite and convenient for the purposes of the said navigation; and also from time to time to alter, repair," &c. the same respectively, or any other conveniences above mentioned; "and also to make, set up, and appoint such roads, towing paths, banks, and ways convenient for towing, haling, or drawing of boats, barges, or other vessels passing in, through, or upon the said cut or canal, as they the said proprietors shall think convenient;" "and also to construct, erect, make, and do all other matters and things which they shall think convenient and necessary, for the making, effecting, extending, preserving, improving, completing, and using the said navigation, in pursuance and within the true intent and meaning of this act."

By the same act (a) the company were empowered to take certain rates, tolls, and duties: and, by sect. 49, it is enacted and declared, "that the said rates, tolls, and duties shall at all times hereafter be exempted from the payment of any taxes, rates, assessments, or impositions whatsoever, any law or statute to the contrary notwithstanding, other than such taxes, rates, and assessments as the land which shall be used for the purpose of the said navigation would have been subject to, if this act had not been made."

Sect. 50 of the same act provides that allowances (to be calculated as therein specified) shall be received by

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(a) Sects. 47, 48

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the company for goods remaining beyond a certain time on wharfs.

By sect. 31 of stat. 23 G. 3. c. 47., which was an act (amongst other things) for incorporating the river *Douglas* navigation with the said *Leeds* and *Liverpool* canal, and for amending the said act of 10 G. 3. c. 114., it was enacted and declared “that the said several navigations, cuts or canals, and every part thereof, and the said tolls, rates, and duties, to be taken upon the same, or any part thereof, under the authority of this or either of the aforesaid acts, shall at all times be exempt from the payment of any taxes, rates, assessments, or impositions whatsoever, other than and except such taxes, rates, and assessments, as the land which hath or shall be used for the purpose of such navigations, cuts, or canals, were or would have been subject to, if this act had not been made; and that such navigations, cuts, or canals, shall not be subject or liable to the payment of any taxes, rates, or assessments, (save and except such taxes, rates, and assessments, as have been, and now are usually charged and assessed thereon), any law or statute to the contrary notwithstanding; but nothing in this clause shall be construed to exempt any quay, wharf, warehouse, or other house, from the payment of any rates, taxes, or assessments.”

Sect. 41 of the same statute enacted (a) that the clause

(a) The part of sect. 41 referred to here was as follows: — “That the several clauses in the said recited acts, or either of them, mentioned and contained, for the appointing of commissioners;” &c.; “that the tolls, rates, and duties, arising from the said canal, shall, at all times hereafter, be exempted from the payment of any taxes, rates, assessments, and impositions whatsoever;” “shall be, and the same are hereby repealed.” The word “that,” at the beginning of the second extract above, had nothing preceding to which it was referable; but it was assumed, in the statement of the case, that the intention was to repeal sect. 49 of stat. 10 G. 3. c. 114.

in

in stat. 10 G. 3. c. 114., hereinbefore set forth, as to the exemption of the tolls, rates, and duties, arising from the said canal, from the payment of any taxes, rates, assessments, and impositions whatsoever, (together with several other parts of the said act) should be, and the same were, thereby repealed.

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By stat. 59 G. 3. c. cv. (local and personal, public), entitled "An Act to enable the company of proprietors of the canal navigation from *Leeds* to *Liverpool*, to make a navigable cut, and also a collateral branch or railway, from their said canal at *Hennis* bridge near *Wigan*, to join the Duke of *Bridgewater's* canal at *Leigh*, all in the county palatine of *Lancaster*; and to amend the several acts relating to the said *Leeds* and *Liverpool* canal, and an act for making the *Rochdale* canal, so far as relates to certain powers therein given to the late Duke of *Bridgewater*," after reciting all the prior acts of parliament, power was given (a) to the company to make a certain cut from *Hennis* bridge to join the Duke of *Bridgewater's* canal at *Leigh* in *Lancashire*, not being a place in the town or parish of *Liverpool*; and it was enacted "that all and every the clauses, powers, authorities, provisions, orders, rules, regulations, limitations, restrictions, prohibitions, exemptions, penalties, forfeitures, punishments, matters, and things" contained in the former acts of parliament, except such as had before been expressly repealed, or were repealed or altered by that act (with some other exceptions not here material), should extend to the purposes of that act, as if repeated and re-enacted therein.

Sect. 17 enacts, "that all and every the lands, dwell-

(a) Sect. 1.

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ing houses, wharfs, quays, warehouses, lock houses, and other houses of and belonging to the said company of proprietors, shall be rateable and chargeable to the maintenance of the poor, and to all parochial rates and taxes in the several parishes, townships, or places where they are respectively situate, the lands according to the quantity and quality, and the dwelling houses, wharfs, quays, warehouses, lock houses, and other houses, according to the nature and respective uses, dimensions, and descriptions thereof; and shall be charged and assessed in like manner as lands of a like quality, and as dwelling houses, warehouses, lock houses, and other houses of a like and similar size, nature, dimension, or description, in the respective parishes, townships, or places where the same shall be situate, are or shall be assessed and charged; and that as well the rates, duties, and other personal property of the said company, liable to be rated to the poor, or other parochial taxes, in any such parishes, townships, or places, as also the tolls, rates, and duties hereby granted to the said devisees" (of the Duke of *Bridgewater*), "shall be rated and assessed in like manner and in the same proportion as other personal property rateable in the said parishes, townships, or places respectively, shall be rated and assessed; and according to the length of the line of the said canals and navigations in such respective parishes, townships, and places, and not otherwise, or in any other manner: provided, that before any such personal property shall be rated thirty days' notice shall be given in writing to the respective clerks of the said company of proprietors, and of the said devisees, by the respective overseers of the poor of such parishes, townships, or places of their intention so to do."

The

The *Leeds* and *Liverpool* canal has been finished, and a communication has been made between *Leeds* and *Liverpool*, terminating at the *North Lady's Walk* in *Liverpool*; but no communication has been made from thence to the river *Mersey*.

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The company have, since the passing of stat. 10 G. 3. c. 114., and also of stat. 59 G. 3. c. cv., purchased from individuals different pieces of land, in which they have cut the branches and basin hereinafter mentioned, and made cuts and conveniences under the general powers contained in the said acts of parliament, branching out at several points from the original parliamentary line, now the main line or trunk of the canal, eastwardly towards and into the town of *Liverpool*. On the land so purchased, and upon the sides of the said branches and basin, the company have wharfs, at which vessels can unload, and by means of those branches and basins the traders and those who navigate boats upon the canal have greater facilities of loading boats, and goods carried upon the canal can be brought more into the town, and can be unloaded to greater advantage, and may be kept unloaded longer, than could otherwise be done, which is of considerable advantage to the public and those trading upon the canal, and to the company of proprietors; but the company do not take any additional tolls or tonnage rates for such cuts or basins, other than wharfage upon the wharfs adjoining the cuts and basins.

The company are, and at the time of the rate were, in the occupation, within the parish of *Liverpool*, of a warehouse; a shed for packets, and shed on packet wharf; a manager's house, counting-house, stables, and cottages; seven cranes, and three weighing-machines; which,

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which, according to the value of similar adjacent property, are, together, of the annual value of 524*l.* As to the above value of the above property, there is no dispute; and the rate is right in respect thereof.

The said company are, and at the time of making the said rate were, also in the occupation, within the parish of *Liverpool*, of a portion of their canal, basins, and towing path, being in the original and parliamentary line, which is now the main line or trunk of the canal; which canal, basins, and towing path are within the said parish of *Liverpool*; and the same land, if it is to be estimated according to its value as agricultural land at the time of the passing of stat. 10 G. 3. c. 114., should be rated at 30*s.* a statute acre only; and the amount for which the company would be rateable for the same to the poor within the parish of *Liverpool*, if calculated on that principle, would amount to 16*l.*

If it is to be estimated as mere land according to the value, at the time of making the present rate, of similar adjacent property in the said parish of *Liverpool*, then the value is 1806*l.* 3*s.* 6*d.*

If it is to be estimated as land used for the purposes of navigation, and that estimate is founded upon the criterion of what the land so used would let for, supposing the party taking it to form his calculation from the amount of the tolls received on the whole line of the canal (deducting the necessary expenses), and applying the profits to the portion of the canal in the parish of *Liverpool*, upon an average of the whole line, then the amount to which the company would be rateable for the same to the relief of the poor within the parish of *Liverpool* will be 698*l.* 2*s.* 9½*d.*

If it is to be estimated as land used for the purposes
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of navigation, and that estimate is formed upon the criterion of what the land so used would let for, supposing the party taking it to form his calculation upon the amount expended in rendering the land within the parish fit for the purposes of navigation as it now exists, then the annual value is 361*l.* 7*s.*

Besides the said property in the original parliamentary main line or trunk of the canal, the Company are, and at the time of making the said rate were, in the occupation within the parish of *Liverpool* of the branches and basin so cut by them in the said land so bought by them as aforesaid, not being in, but branching from, the said original or parliamentary line, for the convenience of the trade upon the canal, which consist of a certain basin and three branches, with wharfs on each side, in the parish of *Liverpool*, to the eastward of the said canal but communicating with it. The first of the three branches was made in 1801, and was afterwards enlarged; the second was made in 1816, and was enlarged in 1824; and the third was made in 1828. Upon parts of the first and second branch cuts the Canal Company have wharfs and quays in their own occupation, for the use of the public and traders upon the canal. Upon the third branch the company have wharfs or quays, which are let off to and in the occupation of tenants at certain rents payable to the company, upon parol demises from year to year. The tenants have the sole privilege of navigating the said third branch cut; the land upon which the water of the third branch rests is not demised by the company. The tenants would not pay the same amount of rent unless they enjoyed the privilege of navigating the said branch. The basin and branches, if they are to be

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estimated according to the said purposes for which they are used, are of the annual value of 1713*l.* 12*s.* 6*d.*

If they are to be estimated as mere land, without regard to the use to which they are applied, they are of the annual value (a) of 685*l.* 9*s.*

The company are, and at the time of the making the said rate were, also in the occupation within the parish of *Liverpool* of three wharfs, being part of the land so purchased as aforesaid; one of which is a packet office wharf. These wharfs, as mere land (a), without reference to the use thereof, are of the annual value of 395*l.* 13*s.*, according to the value of adjacent property. The wharfs and packet office are maintained by the company as a convenience for the persons navigating the canal: but they likewise receive a profit from persons using the wharfs. As wharfs, according to the value of similar property in *Liverpool*, the said three wharfs are of the annual value of 68*l.* 15*s.* 6*d.*

Stock in trade, profits, and other personal property, are not rated in the parish of *Liverpool*. The rate for the parish of *Liverpool* is laid upon the principle of taking the full annual value of the property to be let.

The parties were to be at liberty to refer to any of the acts relating to the canal, as if they had been incorporated in this case.

The questions for the opinion of the Court were, First, whether, under the several acts of parliament set forth, the land of the canal in the original or parliamentary line is to be rated, first, according to its value in 1771: or, secondly, according to its value at the time of the making of the said rate, with reference to the value

(a) That is to say, having the argument in comparison with adjacent property.

of adjacent land; or, thirdly, according to its value for the purposes for which it is used; and, if so, in what manner and according to what criterion that value is to be ascertained? Secondly, whether the said branches and basin are to be rated, first, according to the value of land in 1770, or, secondly, according to their value as mere land at the time of the rate, with reference to the value of adjacent land; or, thirdly, according to their value for the purpose for which they are used, and, if so, in what manner, and according to what criterion such value is to be ascertained? The rate to stand or be amended accordingly.

The case was argued in *Trinity* term last (a).

Cresswell and *Crompton* in support of the order of sessions.

First, as to the land occupied by the original or parliamentary canal. By stat. 10 G. 3. c. 114. s. 49. the tolls are exempted from rates, other than such as the land would have been subject to if the act had not been passed. This enactment was made before it was decided (as in *Rex v. Nicholson* (b)) that tolls were not rateable per se. There was a decision on a similar clause in *Rex v. The Chelmer and Blackwater Navigation Company* (c). There it was held that the land was to be rated at the same value as other adjacent land, without reference to the value derived from its application to the navigation. Then in stat. 59 G. 3. c. cv. s. 17. nothing occurs to shew that the value of the land at the time of making the canal is referred to. The language is, "are

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(a) June 7th, 1837, before Lord Denman C. J., *Littledale, Patterson, and Williams* Js.

(b) 12 East, 390.

(c) 2 B. & Ad. 14.

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or shall be assessed." The earliest period which could be referred to, even if this statute did not refer to future value, would be 59 G. 3. But the reasoning of the Court in *Rex v. The Chelmer and Blackwater Navigation Company (a)*, as to preventing loss or gain to the parishes from the undertaking, shews that the comparison is to be made with the value of the adjacent lands at the time when the rate is made. This interpretation is confirmed by *Rex v. The Monmouthshire Canal Company (b)*. And the judgments in *Rex v. The Leeds and Liverpool Canal Company (c)* do not, when fairly looked at, confine the value to the time of making the act. [Lord Denman C. J. The words in stat. 10 G. 3. c. 114. s. 49., "if this act had not been made," apparently refer to a value to be ascertained at the times of the several rates: yet, if the canal itself contributes to raise the value of the adjacent property, it is extremely difficult to adhere to such a test precisely.] No doubt there would be some difficulty: however, there are many other circumstances in *Liverpool* which would tend to raise the value from time to time. It appears too, from *Rex v. The Monmouthshire Canal Company (b)*, that the value which the adjacent property has acquired from the undertaking having been carried into effect is not to be excluded. If the land covered by the parliamentary canal be rated according to its profit derived from tolls, the value must be taken, not in that proportion to the whole profits earned between *Leeds* and *Liverpool* which the part lying in *Liverpool* bears to the whole length of the canal from *Leeds* to *Liverpool*,

(a) 2 B. & Ad. 14.
 (c) 5 East, 325.

(b) 3 A. & E. 619.

but

but according to the profit which the navigation produces in *Liverpool: Rex v. The Earl of Portmore* (a), *Rex v. Kingswinford* (b).

Secondly, the cuts and basins not in the parliamentary line must be rated according to stat. 59 G. 3. c. cv. s. 17. That will bring the rate, at least, to the value of land in the neighbourhood at the time of the rate: if the cuts, &c., be considered as land prepared by labour for the purposes of the navigation, and the value taken be that which contiguous land so prepared would bear, the rate will be much higher.

Thirdly, as to the wharfs and quays. They are to be rated according to their nature, uses, dimensions, and descriptions, as lands of a like quality, and as dwelling houses, &c., of the like size, nature, dimension, or description: on the authorities and principles before pointed out, the value of similar adjacent property at the time of the rate is the criterion meant; and the value given to such adjacent property by the contiguity of the canal is to be taken into consideration. If the application of the land to the purposes of wharfs, &c., is taken into consideration, the rate will be higher than if reference be made merely to land not so applied; but the lowest estimate must be, at any rate, made according to the present value. The sounder construction, however, appears to be, that the wharfs are to be rated at what other wharfs in the neighbourhood would let for.

Sir *F. Pollock*, *Atcherley* Serjt., *Wightman*, and *Henderson*, contrà. First, as to the canal in the parliamentary line. The statute 23 G. 3. c. 47. has not been adverted

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(a) 1 B. & C. 551.

(b) 7 B. & C. 236. See *Rex v. Woking*, 7 A. & E. 40.

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to on the other side. That statute repeals sect. 49 of stat. 10 G. 3. c. 114.; but, by sect. 31, it exempts the navigations, cuts or canals, and the tolls to be taken on them, from all rates, &c., except such as the land used for the purpose of the navigations, cuts, or canals, would have been subject to if the act had not been made; and the navigations, cuts, or canals are to be liable to such rates only as *have been and now are usually charged upon them*; but quays, wharfs, warehouses, and other houses, are not to be exempt. Here the legislature distinguishes the land used for the canal from that on which quays, wharfs, or houses are built. The latter is not protected: the former is to remain subject to the old charges only. The legislature probably intended to favour the undertaking: the exemption of the tolls, as the law was then understood, was supposed to exempt the land covered with water. So, in *Rex v. The Calder and Hebble Navigation Company* (a), an exemption of the rates and duties levied on the canal was held to be an exemption of the land altogether. Such a favourable intention may be accounted for by the circumstance that such enterprises were then first beginning to be undertaken in this country. The legislature at any rate would not have first exempted the tolls, and then the land covered with water: that would have appeared to be enacting the same thing twice over. The meaning was, therefore, to exempt the land occupied by the canal altogether, except so far as it was previously liable. This is the only interpretation which accounts for the distinction made between land covered with water, and land covered with quays or buildings: it was supposed that the latter, in default of express provision, would

(a) 1 B. & Ald. 263.

have

have been included in the previous virtual exemption of the land. Then stat. 59 G. 3. c. cv. s. 17. continues all exemptions, &c., and makes only *lands* and dwelling houses, &c., liable to rate, leaving the navigations, cuts, or canals, under the provisions of stat. 23 G. 3. c. 47. [*Patteson J.* They are not the less land for being covered with water. In *Rex v. The Regent's Canal Company* (a) the expression in the act was "lands, whether covered with water or not."] The language of stat. 23 G. 3. c. 47. s. 31. shews that the legislature did not use "land" in this general sense; if they had, they would have distinguished, not between navigations, cuts, and canals, and land used for the purpose of such navigations, &c., but between the land covered with water, and the land before it was covered with water; and the exception as to quays, &c., would have been made under some such terms as *land used for quays, &c.* A specific exemption can be taken away only by a specific repeal; per *Bayley J.* in *Rex v. St. Peter the Great* (b). [*Patteson J.* Sect. 41 of stat. 23 G. 3. c. 47. seems to repeal what was never enacted. There was no general exemption of tolls. *Williams J.* There was a case (c) in which the common legal meaning of the word *tenement* was held to be restrained by the sense in which it appeared to be used by the legislature.] The direction in sect. 17 of stat. 59 G. 3. c. cv., that the lands shall be rated "according to the quantity and quality," seems inapplicable to the canals. [*Patteson J.* That was the very statutable direction as to rating the "lands, whether covered with water or not," in *Rex v. The Regent's*

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(a) 6 B. & C. 720.

(b) 5 B. & C. 478.

(c) See *Rex v. The Manchester and Salford Water Works Company*, 1 B. & C. 630.

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Canal Company (a).] The words "canals and navigations" are used, even in sect. 17 of stat. 59 G. 3. c. cv., as designating a distinct subject from lands. There seems good reason for confining the value to the time of the commencement of the undertaking. That value was definite and capable of being known; the criterion suggested on the other side would be fluctuating. The first two acts received an interpretation in *Rex v. The Leeds and Liverpool Canal Company* (b); and there all the Judges took it for granted that the land, quâ land, was rateable at the value which it had before the commencement of the undertaking. So in *Rex v. St. Peter the Great* (c) similar language is expounded to mean that the land shall remain chargeable in the same manner "as it was when first taken for the purposes of the canal." The language of the enactments in former cases will be found to be different from the language here. In *Rex v. Kingswinford* (d), *Rex v. St. Mary, Leicester* (e), *Rex v. The Grand Junction Canal Company* (g), and *Rex v. The Chelmer and Blackwater Navigation Company* (h), there was the expression "from time to time." It is perhaps not easy to reconcile *Rex v. The Monmouthshire Canal Company* (i) and *Rex v. The Chelmer and Blackwater Navigation Company* (h) with earlier decisions. There are no means of ascertaining what would now be the value of lands of a quality like that which these lands had when taken. If the adjacent property had remained in the same state as at the commencement of the undertaking, perhaps the fluctuations in value might have

(a) 6 B. & C. 720.

(c) 5 B. & C. 473.

(e) 6 M. & S. 400.

(h) 2 B. & A. 14.

(b) 5 East, 325.

(d) 7 B. & C. 236.

(f) 1 B. & Ald. 289.

(i) 3 A. & E. 619.

been

been followed up : but, as the facts are, it is impossible to obey the words of the act in the sense contended for on the other side. The literal sense would seem to point to the value of other lands covered with water ; but that interpretation would leave no rate at all, tolls being exempted.

Secondly, as to the cuts and basins not in the parliamentary line. There are no tolls on these ; therefore they have no value, except from their giving a value to the wharfs and quays adjacent. Now, that value cannot be rated twice, namely, on the cuts and basins, and also on the canals. [*Williams J.* You would say the case resembled *Rex v. Sculcoates (a)* in this respect]. Suppose an owner of land had a street consisting of opposite rows of houses, he could not be rated for the space between the two rows, on the pretence that, by its width, it raised the rents of the houses.

Thirdly, as to the wharfs and quays. The statute does not lay down any precise subject of comparison for these, there being no words answering to them in the enumeration of articles of property as a standard of comparison. If they are to be rated like other similar property, including the value they derive from the vicinity of the canal, such value must, at any rate, be taken into the estimate only once.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. (After stating the rate, and the decision at sessions, his Lordship proceeded as follows.)

From the case it appears that, by virtue of several acts of parliament (hereafter to be more particularly noticed),

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(a) 12 *East*, 40.

the

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the said company completed a canal from *Liverpool* to *Leeds*, which is called the "Original and parliamentary line," and have also made communications between that and other navigations at a distance from the borough of *Liverpool*, not necessary to be more fully described. They have also made, and are in the occupation of, certain branches, or cuts and basins, within the said borough of *Liverpool*, communicating with the said principal line; and also quays, wharfs, and various other property connected with the same. It may be proper, for the sake of clearing the way, to observe that, as to the sum of 52*l.*, parcel of the 3400*l.*, assessed on a warehouse, manager's house, shed, and cranes, the rate is admitted to have been properly imposed, those tenements being estimated according to the annual value of similar adjacent property.

The contested points we shall take in the order in which they occur in the statement of the case. But it will be necessary now to advert to those parts of the different acts of parliament upon which the questions depend; and these will be found to be the clauses exempting "the rates, tolls, and duties" from the payment of rates.

The original act (10 G. 3. c. 114.), incorporating the said company, and empowering them to take rates, tolls, and duties upon the canal, has the following exempting clause. (His Lordship here read sect. 43 of stat. 10 G. 3. c. 114., for which see p. 673. *ante*.)

The next act, stat. 23 G. 3. c. 47., which was passed for one of the purposes before alluded to, namely, for incorporating the river *Duglas* navigation with the said canal, and for amending the first mentioned act, repeats the exempting clause above set forth, and substitutes the

the following. (His Lordship here read sect. 31 of stat. 23 G. 3. c. 47., for which see p. 674, *antè*.)

Stat. 59 G. 3. c. cv., which was passed chiefly for effectuating another of the purposes before alluded to, namely a junction between the *Leeds* and *Liverpool*, and the late Duke of *Bridgewater's*, canal, after continuing the provisions of the former acts, except *such as were thereby repealed or altered*, contains the following section. (His Lordship here read sect. 17 of stat. 59 G. 3. c. cv., for which see pp. 675, 676, *antè*, as far as the words "assessed and charged.")

The first question arises upon the portion of land within the parish of *Liverpool*, occupied by the canal basins and towing-path, of which the extent is given from actual admeasurement in square yards (*a*).

If it had not been for one observation of the counsel for the appellant (hereafter to be noticed), it might have been doubtful whether it was meant to be argued that this land so employed is not liable to be rated *at all*. But, be that as it may, we think the language of the exempting clauses places the matter beyond a doubt. If indeed those clauses had simply exempted the tolls *without more*, it might have been contended, with great reason, that, as land is rateable only in respect of the profit it produces, and as tolls are the profit of land used as a canal, the subject-matter for the rate being taken away, no rate could be imposed, even though the land itself had not been expressly exempted. And this was the precise ground of the decision of this Court in the case of *Rex v. The Calder and Hebble Navigation Company* (*b*). But here the tolls are exempted, while

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(*a*) It has not been thought necessary to give this statement in the report.

(*b*) 1 B. & Ald. 263.

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the land used for the navigation is left subject to a rate. And, if in a case so plain authority were requisite, it would not be wanting from the construction put by the Judges upon the two first mentioned acts of parliament in a case concerning this very canal (*a*). Lord *Ellenborough* there says, “the meaning of the clause of exemption was, that the land or space occupied by the canal should be liable to be taxed as it was before, that is as *the land* was before.” Mr. Justice *Lawrence* observes that “the meaning of the clause of exemption clearly is that the land, *quæ* land, shall not be exempted, but that the tolls shall.” We have therefore no doubt whatever that the land must be rated *somehow*, and that the only question is *how*.

And, upon this point, several different modes of valuation are suggested; as to which it might be sufficient to say which, in our opinion, ought to be adopted. We will observe, however, that the calculation of value “as agricultural land” seems to be wholly unauthorised by any thing to be found in any of the acts of parliament. We reject also all calculations founded upon a supposition that the land is applied for the purposes of a canal, because, as there must be some value to make it rateable at all, its value upon that supposition must be the profits of a canal, or, in other words, *the tolls*, which, as we have seen, are expressly exempted, except in the event of a rate being imposed on personal property. The only remaining criterion suggested is to take its value, “according to the value of similar adjacent property” in the parish of *Liverpool*. And, upon the whole, we think this is the true principle, and that, by reference to and

a. Rex v. The London and Liverpool Canal Company. 5 Burr, 325.

comparison

comparison with what is immediately adjoining, a reasonable estimate of the actual value of the land may be obtained. And, moreover, as has been before observed, this mode of valuation actually has been adopted in that part of the rate which is admitted.

But is this to be the value at the time of passing the acts, of making the canal, or of making the rate? Our recent decision in the case of *Rex v. The Monmouthshire Canal Company* (a) answers the question; and nothing but the pressure of the most cogent reasons, or the most unambiguous language of the acts of parliament, could induce us to impose so unreasonable and impracticable a duty upon parish officers, as to find the value of property sixty or seventy years ago. It has not escaped us that, in the statement of this case, it is said that the value of agricultural land in the neighbourhood in question, at the time of passing stat. 10 G. 3. c. 114., was 30s. an acre. How this conclusion was arrived at we know not; but that it must have been in a great degree precarious conjecture there is every reason to believe.

The question, however, for our decision is, what is the proper construction to be put upon the acts of parliament as to this point. And, if that had depended upon the first act (10 G. 3. c. 114.), it seems impossible to raise a doubt. The exemptory clause (b) in that act, it will have been observed, is in these words, "that the said rates, tolls, and duties shall at all times hereafter be exempted from the payment of any taxes, rates," &c., "other than such taxes," &c., "as the land which shall be used for the purpose of the said navigation would

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(a) 3 A. & E. 619.

(b) Sect. 49.

have

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Then to what would the land have been subject? Assuredly not to *the* rate which at that time might chance to be imposed, but to *any* rate which might from time to time be imposed from a change of circumstances and of value.

Stat. 23 G. 3. c. 47. does indeed repeal the above provision; but the exempting clause (sect. 31) has the same precise words as those just quoted, with this addition, "and that such navigations, cuts, or canals, shall not be subject to the payment of any taxes, rates, or assessments, (save and except such taxes, rates, and assessments, as have been, and now are *usually* charged and assessed thereon)." Now we are not prepared to say that these words fix and define the rate to which the land is for ever to be subject, in the manner contended for by the counsel for the appellants. The question recurs, to what rate the land had been and then was usually charged? Certainly not to a rate according to any fixed and never varying standard, but to a rate variable according to circumstances, in the manner before alluded to, and which it is unnecessary to repeat.

But we are not driven to arrive at a conclusion upon this state of the question. It is important to attend to the provisions of the last act upon the subject, stat. 59 G. 3. c. cv. That, in its title, is declared to be an act (inter alia) for the purpose of amending the several acts relating to the said *Leeds* and *Liverpool* canal, and incorporates the provisions of former acts, except such as are repealed or altered by it. If then, according to the argument, the true construction of stat. 23 G. 3. c. 47. be that the land should continue thereafter to be assessed in the same sum as in the then existing rate, it is certain

that

that this provision has been "repealed or altered" by stat. 59 G. 3. c. cv. Upon the language of this (the last) act it is as impossible to raise a doubt as we have before said we think it to be upon the language of the first. (His Lordship then read sect. 17, for which see pp. 675, 676, *antè*, as far as the words "assessed and charged.") Now this we consider to be conclusive. And, even supposing the last cited section not to have "repealed or altered" the provision of stat. 23 G. 3. c. 47., yet it is an undoubted and acknowledged rule of construction that statutes in *pari materia* are to be taken together; and, even in this view, a strong inference arises that successive rates, and not any particular rate, were in the contemplation of the legislature.

It may also be observed, before we quit this part of the subject, that the comparative method of valuation, in favour of which we have already pronounced an opinion, is here expressly recognised and adopted. We think, therefore, that the assessment upon the appellants in respect of this part of the property is rightly taken at the amount of 1806*l.* 3*s.* 6*d.*, as the value of the land occupied by the company in canal, basins, and a towing path, according to the general value of the land immediately adjoining them.

The next question arises upon the basin and three branches of which the appellants are the occupiers, the same not being part of the original line or trunk of the canal, but communicating therewith in the parish of *Liverpool*. To these branches it is stated that there are adjacent quays and wharfs on each side, belonging to the company. And, in the first place, we think that these branches must be considered as part of the whole navigation. Indeed, we are not aware that the contrary

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was contended ; but it was said that, this portion of the navigation having been once rated in the shape of land, is again *virtually* rated in the increased value which it confers upon the adjacent wharfs and quays which are assessed accordingly. That these wharfs and quays are increased in value, and will let for more to tenants, or will be more profitable to the company if retained in their own occupation, cannot be disputed. The case indeed states it, but the thing is obvious ; situation is of course a material ingredient in the aggregate value of this property. That the use of these branches and basin also directly contributes to increase the value, is, as we have already observed, beyond dispute ; but we are unable to assign any precise or practical result to this fact, or to arrive at the conclusion, attempted to be deduced from it, that the rate therefore cannot be sustained. That this part of the navigation is rateable as land we have already seen ; and the wharfs and quays are equally so by express enactment : the amount, therefore, alone is in question ; and when, in this case, various concurrent causes contribute to the general prosperity, and by consequence to the value of property in the place, we think it impossible for human ingenuity to reduce to a calculation, in sums certain, how much should be set down to one cause, and how much to another. They are inseparable, and cannot be analysed. The value of the property must be taken *as it is*, from whatever causes arising. Suppose, in the present instance, the tolls had not been exempted, and that they had been rated, as they certainly might, in the shape of profits, by connecting them with some real property of the company situate in the parish : and it could have been clearly shewn that a great advance in the value of all property

property had taken place by reason of this "navigation:" would it have been any answer to such a rate as we have supposed, that the canal company had been already assessed by reason of the general increase of the rates throughout *Liverpool* from the cause above mentioned?

It is observable also that, in that part of the rate which is admitted to be correct, a value is set upon property so immediately and intimately connected with the navigation that the value without it must, we presume, be reduced comparatively to nothing. We must here remark that this precise argument, and the difficulty, whatever it may be, were pressed upon us in the very same shape in the case of *Rex v. The Monmouthshire Canal Company (a)*, and that they then received from the different members of the Court substantially the same answer as has now been given. We think it right to add that, having had occasion necessarily to reconsider the grounds of our decision in that case, we see no reason to doubt its propriety, or to depart from it. Upon the three branches and basin, therefore, we think the assessment ought to be in the sum (mentioned in the case) of 685*l.* 9*s.* 0*d.*, being their annual value as mere land at the time of rating, without regard to the use to which they are applied.

Our former observations have anticipated all that it is needful to say upon the subject of the wharfs or quays, the last species of property described in the case. We have already said that they are expressly made rateable, and that, in our opinion, the comparative method of valuation is the true one, that is, "according to the value of similar property in *Liverpool*," in the language

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(a) 3 *A. & E.* 619.

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of the case, or (in the words of sect. 17 of stat 59 G. 3. c. cv.) “the lands, dwelling houses, wharfs, quays, warehouses, lock houses, and other houses of and belonging to the said company of proprietors, shall be rateable,” “the lands according to the quantity and quality, and the dwelling houses, wharfs, quays, warehouses, lock houses, and other houses, according to the nature and respective uses, dimensions, and descriptions thereof; and shall be charged and assessed in like manner as lands of a like quality, and as dwelling houses, warehouses, lock houses, and other houses of a like and similar size, nature, dimension, or description, in the respective parishes, townships, or places *where the same shall be situate*, are or shall be assessed and charged.” The words “wharfs and quays” are omitted in the last member of the sentence; but they are expressly made rateable in the former part; and it is impossible to suppose that a different method of valuation was intended for them, from that which is so minutely prescribed for the other property: indeed, if no method of rating them were prescribed by the act, the value of similar property in *Liverpool* would furnish the best criterion of theirs on this principle. In respect of these wharfs and quays, therefore, there must be an addition to the assessment of 694*l.* 18*s.* 6*d.*

It remains briefly to notice an observation of the counsel for the appellants before alluded to, which was intended to go the length of shewing that the space occupied by the navigation and all its parts should be exempt from assessment altogether. It was said that the word “land,” in these acts of parliament, could not mean land covered with water, for that, wherever that was designated, the words “navigation,” “canals,” “cut,” &c.,
were

were used. As to which it is to be observed, first, that it was not shewn to what other property of the company the word "land" (accompanied with and distinguished from every other description of their property) was applicable, except to the land used for their navigation; next, that this interpretation is directly opposed to that of the learned Judges whose language we have already quoted from *Rex v. The Leeds and Liverpool Canal Company (a)*. But, lastly, there is no such contradistinction between "land" and "navigation, cut, or canal," as was assumed, but directly the reverse. In sect. 31 of stat. 23 G. 3. c. 114., upon which we have before commented, the tolls are declared to be exempt from any rates except such "as *the land* which hath or shall *be used for the purpose of such navigations, cuts, or canals*, were or would have been subject to, if this act had not been made; and that *such navigations, cuts, or canals*, shall not be subject or liable to the payment of any" rates, except such "as have been, and now are usually charged and assessed thereon." Except, therefore, the words *land used for navigations, cuts, or canals*, and the words *navigations, cuts, or canals*, mean the same thing, the latter part of the sentence has no meaning at all.

The result, therefore, is that, in our opinion, the company is liable to the extent of the assessment, and that the order of sessions confirming the rate should be confirmed.

Rate confirmed.

(a) 5 East, 325. Antà, p. 690.

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Trespass for chasing and detaining cattle. Pleas, that defendant was possessed of a messuage, &c., and that he and all occupiers thereof for the time being, for thirty years next before the time when, &c., had of right had, and been used, &c., to have common of pasture in the vicus in quo, that the cattle were depasturing, &c., to the disturbance of such right of common, and that defendant distrained, &c.

On special demurrer, for that the right was not claimed to have been used, &c., thirty years before the commencement of the suit. Held,

1. That is a plea under stat. 2 & 3 W. 4, c. 71, the plea was bad, for not claiming the right either so, or so used, &c., thirty years

before the commencement of some suit. As to which latter averment, *infra*.

2. That the plea could not be construed as claiming right of common simply by virtue of possession, assuming that, if so construed, it would have been good.

TRESPASS. The declaration charged that defendant, on &c., broke and entered plaintiff's closes (described by names, abutments, &c.), did damage there, and drove plaintiff's sheep, ewes, and lambs, &c., then depasturing and being in and upon the said closes of plaintiff, from and off the said closes to places at a distance from plaintiff's said closes, and kept and detained the said sheep, &c., and afterwards drove them to other places still more distant, &c.

Pleas. 1. Not Guilty. 2. That the closes in which &c. were not plaintiff's. 3. As to the driving and chasing the sheep, &c., elsewhere than in the said closes of plaintiff, and as to the keeping and detaining the same, that before and at the times respectively in the declaration mentioned, defendant was, and still is, in the lawful possession, and the occupier, of a certain messuage and lands, with the appurtenances, to wit situate and being in &c.: and that defendant, and all the occupiers for the time being of the said messuage, &c., for thirty years next before the said several times when &c., have actually as of right had, and have been used and accustomed to have, and of right ought &c., and defendant then and still of right ought &c., for himself and themselves, his and their tenants and farmers, occupiers of the said messuage, &c., common of pasture in, upon,

and

and throughout a certain place and lands in the county &c., to wit in the parish &c., to wit called &c., for all his and their commonable cattle, levant and couchant in and upon the said messuage &c., every year, and at all times of the year, as to the said messuage, &c., belonging and appertaining: and, because the said sheep, &c., were, before and at the time of the commencement of the trespasses in the introduction to this plea mentioned, in and upon the said place and lands in this plea aforesaid, and whereon defendant is hereinbefore mentioned to have been and to be entitled to common of pasture as aforesaid, depasturing, destroying the grass &c.: justification, that defendant took them depasturing and doing damage so that defendant could not enjoy his common in so ample a manner as he ought; and that defendant was driving them to a pound, but released them at plaintiff's request.

Demurrer to the third plea, assigning for causes, that it does not appear by the plea for how many years next before the commencement of this suit defendant and the occupiers for the time being of the said messuage, &c., or defendant, have actually of right had, or have been used and accustomed to have, the common of pasture as in that plea mentioned. Joinder in demurrer. The case was argued in *Michaelmas* term last (a).

Ogle for the plaintiff. First, the thirty years should have been laid next before the commencement of the suit, or, (according to *Jones v. Price* (b)) simply, before. By sect. 1 of stat. 2 & 3 W. 4. c. 71., no claim by prescription to right of common, &c., where the "right,

(a) November 10th, 1837, before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) 3 New Ca. 52.

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profit, or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of thirty years," shall be defeated by shewing only that it was first taken at some time prior to such period. That period, by sect. 4, is "the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question." These words have never been understood to relate to the period as measured back from the trespass, in any of the cases from *Bright v. Walker* (a) to the present time. In *The Monmouthshire Canal Company v. Harford* (b) the fourteenth plea laid the period as twenty years next before the commencement of the suit, and before either of the times when &c. In *Tickle v. Brown* (c) the period was laid as forty years next before the commencement of the suit. In *Wright v. Williams* (d) the plea was in the same form; and, on demurrer, it was objected that the period should have been laid as forty years before the time when &c.; but the plea was held good. It may be said that these authorities, although they shew that the period may be so laid, do not prove the mode here used to be incorrect. But both forms cannot be good. [*Patterson J.* Why not? Thirty years before the trespass must, à fortiori, be thirty years before the suit.] Suppose a trespass committed in 1800. A party now suing for that might, unless the statute of limitations were pleaded, recover. But could it be meant that, if there had been a subsequent cesser and abandonment of the

(a) 1 C. M. & R. 211. S. C. 4 Tyrwh. 502.

(b) 1 C. M. & R. 614. S. C. 5 Tyrwh. 68.

(c) 4 A. & E. 369.

(d) 1 M. & W. 77. S. C. Tyrwh. & Gr. 375.

right,

right, a party should still be entitled to avail himself of such right, because it had been exercised for a period of thirty years before such abandonment or cesser? [*Paterson J.* The legislature never meant to meet such a case: they left it to the statute of limitations.] Secondly, the plea should have stated the right to have been enjoyed without interruption. Thirdly, the declaration charged a series of acts, all of which are trespasses; the plea answers it only as to driving the sheep, after they were driven from the plaintiff's closes, and detaining them; it admits, for the purposes of that plea, that the defendant, before doing so, broke and entered the plaintiff's closes, and drove the sheep thence. Now the defendant cannot avail himself of his own wrong; he had no right to drive the sheep from the plaintiff's closes to a place where he, the defendant, had common, and then to distrain them. [On the second objection he cited *Parke B.* in *Bright v. Walker (a)*, *Tickle v. Brown (b)*, *Beasley v. Clarke (c)*; but the Court decided on the first objection only.]

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Montague Smith, contra. As to the first objection. The point on the prescription act does not arise. This is a transitory action for damage to personal chattels; and the defendant, justifying his act as done in defence of his right of common, which is infringed, is in the same position as a plaintiff in trespass quare clausum fregit: he may, therefore, rely on the naked possession as against the plaintiff, a wrong doer; and the allegation of thirty years' enjoyment is surplusage. It lies on the plaintiff here, as on the defendant in an

(a) 1 C. M. & R. 219. S. C. 4 Tyrwh. 509.

(b) 4 A. & E. 369.

[(c) 2 New Ca. 705.

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action of trespass, to set out his title specially. This appears from an *Anonymous* (a) case in *Salkeld*. The dictum there has since been disputed; but the principle of the decision, which is all that is material here, was upheld in *Taylor v. Eastwood* (b); and the authority is cited to the same effect in *Com. Dig. Pleader* (C 41.), and in note (1) to *Stennel v. Hogg* (c) and note (2) to *Mellor v. Spateman* (d). [Patteson J. You say it is as if you had sued for disturbance of common.] *Bright v. Walker* (e) since the statute, and *Atkinson v. Teesdale* (g) before the statute, shew that it is enough to declare on the possession. Further, this is a good plea under the statute. The material question is the right of the party at the time of the trespass. The intention of the statute was to get rid of the difficulty which formerly existed in proving a prescription. Sect. 5 prescribes a mode of pleading in lieu of the allegation of time immemorial. Now the prescription must have related, under the former state of law, to the time of the act; for it was an allegation of right under which the defendant justified. Sect. 4 relates only to the mode of proof when the fact of enjoyment is challenged: it does not appear to be incorporated in sect. 5. If sect. 4 be literally applied to the form of the plea, the allegation must be of an enjoyment for thirty years next before *any* suit in which the claim has been questioned. [Patteson J. Suppose a defendant plead thirty years' enjoyment before the commencement of the suit, and fail upon a traverse of such enjoyment; and, ten years after, a second action be

(a) 2 *Salk.* 643.(b) 1 *East*, 212.(c) 1 *Wms. Saund.* 221.(d) 1 *Wms. Saund.* 346 c. And see *Ibid.* 346. note (2).(e) 1 *C. M. & R.* 211. *S. C.* 4 *Tyrwh.* 502.(g) 3 *Wils.* 278.

brought:

brought: can he set up a thirty years' enjoyment before such second action?] That appears to be a necessary result of a literal interpretation of the statute; which shews that such interpretation is erroneous. Indeed, it is not necessary that the right should be brought into question in this suit: the possession might alone be traversed. Suppose, after the alleged trespass, the defendant had released his right of common: he could not then plead in the form contended for on the other side: yet the statute could not intend that he should be precluded by this from justifying under the right which he had at the time of the trespass. The utmost that *Wright v. Williams* (a) shews is that a plea alleging the enjoyment forty years before the commencement of the action is not demurrable. If sect. 4 were imperative as to the form of pleading, it would be necessary to plead "next before;" but the contrary was decided in *Jones v. Price* (b), where *Tindal* C. J. said that the fourth section "is nothing but an exposition of the proof required to establish the right. It is a mere question of evidence." [On the second objection, he cited *Bright v. Walker* (c); and, on the third, note (1) to *Potter v. North* (d), and *Mattravers v. Fosset* (e).]

Ogle, in reply. As to the first objection. The plea is of a prescription under the statute: it cannot be construed as a simple justification under possession. But, if it could, it would be bad. It is clear law that a right of common upon a mere possession cannot be pleaded in answer to an action of trespass, though it is other-

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(a) 1 M. & W. 77. S. C. *Tyrwh.* & Gr. 375. (b) 3 New Ca. 52.
(c) 1 C. M. & R. 211. S. C. 4 *Tyrwh.* 502.
(d) 1 Wms. Saund. 347. (e) 3 Wils. 295.

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wise as to the declaration. No distinction can be drawn, as to this, between trespass quare clausum fregit and trespass for taking cattle. As to the statute, most of the difficulties suggested on the other side were brought before the Court in *Wright v. Williams* (a). If the act complained of was committed twenty years before the commencement of the suit, and a thirty years' enjoyment before such commencement is shewn, that is the very case upon which the statute intended to found a prescriptive right. But, if, before the action, though after the trespass, the right has been interrupted, there the prescriptive right, to be tried in the action, can no longer be shewn within the meaning of the statute.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*January 18th*), delivered the judgment of the Court. After stating the pleadings, and the demurrer, his Lordship proceeded as follows.

The objection arises upon stat. 2 & 3 W. 4. c. 71., sections 1, 4, and 5. The defendant's counsel, however, endeavoured to avoid the objection by arguing that this plea may be supported at common law, without any reference to that statute; that it is, in substance, an allegation that the defendant is possessed of a messuage and lands, by reason whereof he is entitled to right of common, and that he drove away the plaintiff's sheep which were disturbing that right; and that such allegation is sufficient in a plea to a transitory action for chasing sheep, without claiming the right of common by prescription in a que estate, inasmuch as that right is in this case

(a) 1 M. & W., 77. S. C. *Tyrwh.* & Gr. 375.

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only inducement or conveyance. He relies on the cases which establish that such an allegation is sufficient in a *declaration* for disturbance of common, and on the analogy to a plea justifying the taking of cattle damage feasant, in which it is sufficient to allege the defendant's possession of the *place* where the cattle are taken. We have not found any case in which the principle established in those cases, viz. that, as against a wrong doer, it is sufficient to allege possession, has been applied to a plea stating a *right of common*. A note of Mr. Serjeant *Williams* in the case of *Mellor v. Spate-man* (a) was referred to, in which he so lays down the rule in these words, "Indeed, where the right of common is only inducement or conveyance, it is held sufficient for the defendant to allege that he is *possessed*; as where the justification is, an escape of the cattle from a common to the close in which, &c. through defect of a fence, which the plaintiff is bound to repair, *or an escape from the defendant's own close*:" but the authority he cites, viz. *Faldo v. Ridge* (b), supports only the latter part of the sentence.

The point may be doubtful; but we think that we are not called upon to determine it: for, on attentively considering this plea, we cannot treat it as averring only possession of a right of common, but are satisfied that it avers a right of common in a *que estate*, substituting for time immemorial thirty years under the late statute. *Dorne v. Cashford* (c) is an express authority to shew that a bad averment of a right in a *que estate* in a *declaration* cannot be treated as an averment of possession

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(a) Note (2) to *Mellor v. Spate-man*, 1 *Wms. Saund.* 346.

(b) *Yelv.* 74.

(c) 1 *Salk.* 363. *S. C.* 1 *Com. Rep.* 44.

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only, though such an averment, properly framed, would have been sufficient in the case.

We come, therefore, to the principal objection; viz., that the thirty years are laid "next before *the said times when &c.*," instead of "next before *the commencement of this suit.*"

The first section of stat. 2 & 3 W. 4. c. 71. enacts that no claim to right of common which shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of thirty years, shall be defeated by shewing only that it was first taken at a prior time. The fourth section enacts that *the thirty years shall be deemed* and taken to be the period next before some suit or action wherein the claim shall be brought into question. The fifth section enacts that, in all pleadings in trespass, it shall be sufficient to allege the enjoyment of common as of right by the occupiers of the tenement in respect whereof the same is claimed, for and *during such of the periods mentioned in the act* as may be applicable to the case, and without claiming in the name or right of the owner of the fee as is now usually done.

Taking these sections together, it seems quite clear that the averment of enjoyment for thirty years next before the times when &c. is not in conformity with the act. The period mentioned in the act is plainly thirty years next before some suit or action in which the claim shall be brought into question. Generally speaking, that would be next before the commencement of the suit in which the pleading takes place; at all events, it is not next before the times when &c.

But we were pressed with absurdities and inconveniences which, it is supposed, would arise from such construction



struction of the act; and on the other hand difficulties of the same nature were pointed out, to which we should give occasion by holding the plea to be good.

These absurdities and inconveniences were urged to the Court of Exchequer in the case of *Wright v. Williams (a)*, in which the averment was "next before the commencement of this suit;" but that Court held the averment to be correct; and the decision is directly in point; for we cannot think, as was suggested at the bar, that both modes of averment are correct, and either may be adopted at the option of the pleader. The periods in the two averments are certainly quite different: and the evidence requisite to support them manifestly not the same. We shall not attempt to obviate the difficulties which have been suggested; but, adhering to the express words of the statute, and to the decision in *Wright v. Williams (a)*, with which we fully agree, we hold that the only correct averment is, "next before the commencement of this" (or possibly some other) "suit."

We do not feel that the case of *Jones v. Price (b)* at all militates against this decision: that case merely establishes that the averment of "thirty years before the commencement of the suit" means "thirty years *next* before the commencement of the suit;" in other terms, that the omission of the word "next" does not alter the sense.

Other objections were taken by the counsel for the plaintiff to the plea in question, which it becomes unnecessary for us to notice.

For the reasons stated, we think that the plea is bad, and that judgment must be given for the plaintiff.

Judgment for the plaintiff.

(a) 1 M. & W. 77. S. C. Tyrwh. & Gr. 375. (b) 3 New Ca. 52.

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RICHARDS
against
FRY.

1838.

Thursday,
January 11th.

ANN KINGTON against HACK, the Elder.

This Court will not set aside a writ de contumace capiend on account of defects in the sentence on which it purports to be grounded, if there be a distinct and independent part of the sentence, as an award of costs, free from objection, which has been disobeyed.

Quære, whether an ecclesiastical court can sentence a defendant to perform penance at a minister's house?

JERVIS, in *Hilary* term 1837, obtained a rule to shew cause why the writ de contumace capiend issued in this cause should not be set aside.

By the affidavits on which the rule was granted, it appeared that the plaintiff had instituted a suit against the defendant in the Consistory Court of *Peterborough* for defamatory words. Sentence was given against the defendant, *July* 23d, 1836, he being present in Court; but he now denied that he was admonished at that time, or that any monition had since issued against him, to take out of the registry of the Court a schedule of the penance to be performed by him as by law required. One of the affidavits (by *Hack*) further stated "that he was duly served with a reclamation enjoined by" the principal surrogate of the Court, "to be performed by deponent, which declares that deponent should, on some day before the return thereof, repair to the minister's house at *Brooke*," and, in his presence and that of the plaintiff (if she should attend on notice given her), make a certain acknowledgment and confession. The defendant instructed his proctor to enter an appeal; but, from some neglect, as the defendant alleged, this was not done, and a writ de contumace capiend issued. The writ stated the defendant to be contumacious in not performing the penance as enjoined, "and also in not paying the sum of 25*l.*, the amount of the costs and expenses made and taxed in this cause and decreed to be paid to the said *Ann Kington* or her proctor by the said *William Hack* the elder, on or before the said 20th day

day of *August*" 1836, "for the costs and expenses incurred by her in the cause which was promoted by the said *Ann Kingston* against the said *William Hack* the elder for defamation, which is merely ecclesiastical or spiritual," &c.

The deputy registrar of the Consistory Court made affidavit in answer, among other things, that, on *July* 23d, 1836, when the defendant attended to hear sentence, "he was, notwithstanding the assertion in his affidavit to the contrary, personally admonished to take out of the registry of the said Court a schedule of the penance or reclamation enjoined him to be performed; but this deponent cannot say that the said *W. H.* the elder perfectly understood the purport of such admonition, although it was twice at the least repeated to him, for that he the said *W. H.* the elder, during the time he was attending the said Court on the aforesaid 23d day of *July* 1836, appeared excessively angry, excited, and irritated, and behaved himself in a most turbulent, refractory, and unbecoming manner, declaring that he would not perform the said sentence, and that the Judge might imprison him if he thought fit," &c. It was further stated in this affidavit that, the defendant having neglected to take out the schedule of the penance, a reclamation or penance was served upon him as above stated; that afterwards, defendant having neglected to prosecute the appeal of which he had given notice, the Judge, at his petition, allowed him further time, and proceedings were accordingly stayed till the next Court day, when he again applied for and obtained time till the next Court day; and that, no instructions having then been given for proceeding in the appeal, he was decreed in contempt.

The principal grounds assigned for the present application

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against
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KNIGHT
vs.
HALL

cation were, that the defendant had not been admonished to take out a schedule of the rectification as above stated; that the defendant could not be held contumacious for not doing a penance in the house of another man, which he had no right to enter; that there was no house answering the description given in the sentence; and that the form of submission required by way of penance was such as the Court could not impose. The first ground only was decided upon by this Court.

Channell now shewed cause. The objection that the defendant was not admonished to take out a schedule of the penance is grounded on *Re v. Maby* (a); but there the schedule was material, because the sentence, as pronounced, was imperfect, since it merely called upon the party to perform "the usual penance;" and without the schedule which could be obtained only on paying costs, he could not ascertain what the penance was. But here the sentence, which the defendant heard pronounced, fully describes the penance. And, further, the affidavit against the rate shews sufficiently that the defendant was admonished. Then, the penance itself is correctly imposed. [Lord Denman C. J. Had the Consistory Court power to direct that it should be performed at the minister's house? If not, the defendant would perhaps be a trespasser in going there.] The Ecclesiastical Court had jurisdiction to make such an order. At all events it was not for the defendant to originate the objection. [He then discussed the other alleged defects in the sentence.] But, supposing the sentence to be informal in any respect, yet, if part of it can be sustained, the writ ought not to be quashed.

(a) 3 Dowl. & R. 570.

The defendant is stated in the writ to be in contempt for non-payment of costs; and this is a ground on which a *significavit* has often issued.

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Jervis, contra. The affidavit does not say by whom the defendant was admonished; nor does it shew, unless by way of reasoning, that any admonition was given him which he heard and understood. Then, as to the penance; the party could not perform it without being liable to be treated as a trespasser. In times when penance was inflicted by the immediate agency of the minister himself, a direction like this may have been usual; but a court administering punishment can send the party only to a place where it has authority, and in going to which it can protect him. (He also argued upon the other alleged defects in the sentence.) Then, if the judgment is defective as to the main subject-matter, the costs, which are a consequence of the judgment, must likewise fall to the ground. There may be a *significavit* for non-payment of costs on an interlocutory proceeding; but not on a final judgment which altogether fails. The very defective judgment may have caused an accumulation of costs.

LORD DENMAN C. J. The defendant's allegation, that he was not admonished to take out a schedule, is answered by an affidavit on the other side, stating that he was twice personally admonished. The deponent, indeed, will not say that the defendant perfectly understood the admonition, because he was in a state of great passion. But a man is not to close his understanding against what he might hear, by his own act. The affidavit would have been more satisfactory if it had stated a

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belief that he heard what was said; but there appears, on the statement, no reason that he should not have heard it. And he afterwards gave notice of appeal against the sentence, and asked for time to prosecute such appeal. I therefore think that he appears to have been duly admonished. Then, as to the other objections: if the sentence be sufficient in one distinct part of it this rule cannot be granted. Now it appears that the sentence awarded payment of a precise sum of 25*l.*, the costs and expenses taxed and decreed to be paid to the plaintiff for her costs and expenses incurred in the cause. Whatever objection may be raised as to ordering penance at the minister's house, or on other points, yet, if the Ecclesiastical Court had power to impose costs, the defendant is liable to those; that is an independent subject-matter; and I do not see how the costs can have been increased by any defective proceeding of the Court in the manner suggested. The rule must therefore be discharged.

LITLEDALE, WILLIAMS, and COLERIDGE Js. concurred.

Rule discharged.

1838.

CHESTERTON and Another *against* FARLAR.Friday,
January 12th.

THIS was a suit instituted in the Consistory Court of *London* by the churchwardens of *St. Mary Abbots, Kensington*, for non-payment of a church-rate. The rate, an exhibit of which was annexed to the libel, purported to be "a rate or assessment made the 28th day of *June*, A. D. 1833," "for raising the sum of 1445*l.*, or thereabouts, by a rate or assessment upon the several renters and other holders and occupiers of messuages, lands, tenements, and other hereditaments within the said parish, for repairing, cleansing, preserving, supporting, and amending the said parish church, and for and towards the defraying and indemnifying the churchwardens of the said parish of and from all incidental costs and expenses they may be at or put unto touching or concerning the said office of churchwardens, at 4*d.* in the pound, according to the yearly rent or yearly value of the same for the year from *Lady-day* 1833 to *Lady-day* 1834." *Farlar*, in his answer, contended that the rate was illegally made, and was not legally applied, nor intended to be so; and, in articles propounded by him in addition to the answer, he alleged, "That the said church-rate was and is a retrospective rate, and was made to reimburse and indemnify the said *Charles Chesterton* and *Samuel Hutchins*, the other parties to this cause, for and in

In a suit by *C.* and *H.*, churchwardens, against *F.*, for non-payment of church rate, a libel, answer, and reply were put in, and certain articles were exhibited by the churchwardens with, and in support of, the reply. The articles were rejected in the Consistory Court, but, on appeal to the Arches Court, they were admitted. *F.* then appealed to the Privy Council, and his appeal was referred to the Judicial Committee. While the appeal was depending, but before any proceeding had been taken, in that Court, *F.* moved for a prohibition, on the ground that the rate was bad, and appeared to be so from facts stated on the pleadings.

Held, that a prohibition could not be granted on this ground, the cause being before a court, the jurisdiction of which was not denied, no erroneous proceeding having been taken there, and this Court refusing to presume that the judicial committee would act incorrectly.

Per *Littledale* and *Coleridge* Js. If the motion had been well grounded, no objection would have arisen from the fact that the party moving was himself the appellant.

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respect of payments made by them, or one of them, previous to the making of the said rate, and that the same was also made in order to provide for the discharge of several sums of money to a large amount, due or alleged to be due from the said parish of *St. Mary Abbots, Kensington*, to divers persons long previous to the making of the said rate; and the party proponent doth expressly allege and propound that out of the monies collected by means of the said rate the said *C. C.* and *S. H.* have reimbursed themselves divers sums paid and disbursed by them, or one of them, on account of the said parish, previously to the making of the said rate, and have also paid and discharged divers debts and claims due and alleged to be due from the said parish to divers persons long previous to the making of the said rate" (a). To this article the churchwardens replied: "They" (the churchwardens) "admit that the said rate was and is in part a retrospective rate; but these respondents expressly deny that such rate was made to reimburse and indemnify themselves for payments made by them, or either of them, previous to the making of the said rate; for respondents expressly say that neither they, nor either of them, ever paid, or out of the monies collected by means of the said rate have reimbursed themselves, divers or any sums paid and disbursed by them, or either of them, on account of the said parish, previously to the making of the said rate; for these respondents deny that they, or either of them, have or has made any such disbursements." And

(a) *Farlar* also complained, in the articles propounded by him, of partiality and omissions in the rate. The churchwardens replied, that the mode of assessment was conformable to certain local acts, and that the omissions were, in a number of instances, warranted by the circumstances of the parties left out.

in

in articles also propounded by them, they stated that, for many years before 1832, the church-rate imposed on the *Lady-day* of each year had been made to cover the expenditure of the year from *Lady-day* preceding; that in 1832 it was determined to discontinue that system; and, for the purpose of so doing, the churchwardens borrowed 500*l.* of the guardians of the poor (*Farlar* being one), on the credit of the future church-rates, to pay off outstanding claims; that 265*l.* of that sum remained due when the rate in question was made; and that the rate was agreed to at an open vestry, after a statement of the above claim and some others, with a full understanding that such rate was to be applied in liquidation of those demands.

The articles propounded by the churchwardens were, on a hearing in the Consistory Court, rejected (*a*); and the churchwardens thereupon appealed to the Arches Court, where it was adjudged (*b*) that the articles should be admitted, and they were admitted and exhibited accordingly. *Farlar* then appealed to his Majesty in Council; and the appeal was referred to the Judicial Committee of the Privy Council.

Cresswell, in *Michaelmas* term last, obtained a rule, calling upon the Judicial Committee (on notice to the chief clerk of the Privy Council), and upon *Chesterton* and *Hutchins*, to shew cause why a prohibition should not issue to the Judicial Committee to prohibit them and *Chesterton* and *Hutchins* from further proceeding in the said suit. The affidavit in support of the rule stated, "That, upon such appeal and reference, the said suit

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(a) By Dr. Lushington, April 1836.

(b) By Sir Herbert Jenner, May 1887.

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has become and now is depending before the said Judicial Committee of the Privy Council :” and “that the said *C. Chesterton* and *S. Hutchins* are now, against the will of the said *W. Farlar*, proceeding with prosecuting the said suit against the said *W. F.* before the said Judicial Committee of the Privy Council, for the purpose of enforcing payment by the said *W. F.* of the church-rates in the said first-mentioned articles alleged to be due from the said *W. F.*” In last *Michaelmas* term (*November 25*), and on this day (the case having been adjourned),

Sir *W. W. Follett* and *Holt* shewed cause. The Judicial Committee is, for the purpose of this appeal, an ecclesiastical court; and nothing has been shewn to oust it of jurisdiction. The cognisance of church-rates belongs to the ecclesiastical courts. Where, indeed, they have attempted to exceed their jurisdiction, as by trying questions of boundary, custom or prescription, prohibitions have been granted; so, also, where the rate has been evidently bad, or some other invalidity has appeared on the face of the proceedings, as in *Pense v. Prouse* (a), *Dawson v. Wilkinson* (b), *Leman v. Goulty* (c). Here the rate is good on the face of it, and no defect appears in the proceedings; and, as *Buller J.* says in the case last cited, “If the ecclesiastical judge give a wrong sentence on the merits, where he has jurisdiction, that is only the subject-matter of appeal, and not of a prohibition.” It is not to be assumed that, on the case as disclosed by the pleadings, the present rate is bad. The judges of the Consistory and Arches Courts appear to have entertained different opinions on that subject. In

(a) 1 *Ld. Ray.* 59.

(b) *Ca. K. B. temp. Hard.* 381.

(c) 3 *T. R.* 3.

Taxman's

Towney's Case (a) the proposed poor-rate was, in terms, to reimburse the overseers; and *Holt* C. J. said there, "If a rate be made, and accidents happen, which raise the necessary sum higher, no doubt but the overseers may disburse so much as the rate falls short, and then make a new rate for relief of the poor, but not to reimburse themselves. [*Coleridge* J. It is not said that such a new rate may be made in the following year.] In *Rex v. The Mayor &c. of Gloucester* (b), where the poor-rate, on the face of it, appeared conformable to law, the Court refused to speculate upon the application of it which was said to be contemplated; and *Ashhurst* J. observed that the party objecting to the supposed misapplication might appeal against the accounts. The opinion of this Court, intimated by Lord *Denman* C. J. on a similar question in *Rex v. Sillifant* (c), is to the same effect. In *Rex v. The Chapelwardens of Haworth* (d), which may be referred to on the other side, the proposed rate for reimbursing the churchwardens of *Bradford* would have been bad in form. In *Lanchester v. Thompson* (e), which may also be relied upon, the only point decided was, that a court of equity could not decree a vestry meeting to be led for the purpose of making a rate to reimburse a former churchwarden.

But, whether the rate, under the circumstances disclosed by these pleadings, be good or bad, the Judicial Committee is competent to entertain that question. If it was originally within the jurisdiction of the Consistory Court, it is within that of the Privy Council, under stat. 2 & 3 W. 4. c. 92. The question is still, as it was

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(a) 2 *Ld. Ray.* 1009.(b) 5 *T. R.* 346.(c) 4 *A. & E.* 354.(d) 12 *East*, 556.(e) 5 *Madd.* 4.

1838. . at first, on the validity of a church-rate, which is a
 ——— matter of ecclesiastical cognisance. No intendment
 CHERTSEY ~~against~~ will be made to oust the Ecclesiastical Court of jurisdic-
 FARLAN. tion; *Ricketts v. Bodenham* (a): and nothing has as
 yet been done by the Court of Appeal to authorise an
 interference. The prohibition here is applied for by
 the very party who has brought the case before the
 Privy Council.

Cresswell and Chandless, contra. Darby v. Cosens (b)
 shews that a party who has appealed to a Court may
 himself move to have such Court prohibited from fur-
 ther holding plea of it. [*Littledale J. and Coleridge J.*
 There is no doubt of that.] There are many cases in
 which a party could not take any other measure for
 obtaining the judgment of this Court. If a decree
 were made while this Court was not sitting, he might
 be concluded before he could move for a prohibition,
 unless he could, in the mean time, delay the proceed-
 ings by an appeal. The question then is, assuming the
 present rate to be bad, whether this Court will grant a
 prohibition in the present stage of proceedings. The
 case has been fully brought before the Judicial Com-
 mittee on record; and, as the affidavit states, it is "de-
 pending" in that Court, and the churchwardens are
 prosecuting it there to enforce payment of the rate:
 there is no further step to be taken till something is
 determined by the Judicial Committee. That Court is
 now in the same situation as the Consistorial Court in
Byerley v. Windus (c), where it was held that, if the
 proceedings in the Spiritual Court clearly shewed that

(a) 4 A. & E. 433.

(b) 1 T. R. 552.

(c) 5 B. & C. 1.

a prescription

a prescription was disputed, and that the parties were in progress to bring the question of its existence to trial, the courts of common law might at once grant a prohibition. *Bayley J.*, in delivering the judgment of the Court there observed, "It appears sufficiently upon the pleadings in this cause that the suit below is in progress towards the trial of the prescription:" and judgment was given for the plaintiff in prohibition. So here, if it appear at once to this Court by the pleadings that there is but one matter to try, and that the validity of a rate which they clearly see to be bad, they will, without waiting for any further step, prohibit the churchwardens from going on to enforce such a rate. The case, therefore, ought now to be argued before this Court upon the main question, whether the rate is not, upon the case disclosed by the pleadings, clearly bad.

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Lord DENMAN C. J. The objection to the issuing of this writ must prevail. The dispute here was on a matter originally of ecclesiastical cognizance; the case has been removed by appeal to the Judicial Committee of the Privy Council; and, assuming that committee to be an ecclesiastical court of appeal, it has now cognizance of the cause. And we must, I think, presume that the Court of Appeal will act conformably to law. *Byerley v. Windus* (a) furnishes the distinction upon which we must act in this case. There the matter, about to be brought in question in the Ecclesiastical Court, was one which could not properly be tried there, and over which this Court had jurisdiction. Here the case is otherwise. If, in the progress of the cause, the Ecclesiastical Court

(a) 5 B. & C. 1.

should

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should commit any error, if they do any thing against common law or acts of parliament, we may then interfere. This rule must be discharged.

LITTLEDALE J. I am of the same opinion. This is a matter of ecclesiastical jurisdiction, which the party now applying has carried before the Judicial Committee, thereby admitting that they have cognizance of it. No proceeding has yet taken place there; and I am of opinion that we cannot grant a prohibition.

WILLIAMS J. The cause is properly before the Judicial Committee, which is now substituted for the Court of Delegates. We cannot anticipate that an error will be committed; if that should happen, it will be time enough to ask for our interference.

COLERIDGE J. I am of the same opinion. According to the argument in support of the rule, we must take away all litigious jurisdiction from the Ecclesiastical Courts. In every cause coming before those Courts there must be a wrong and a right, and the party in the right might always move this Court for a prohibition. Here nothing has arisen even incidentally to bring the cause before us: the only ground shewn for entertaining the application is, that one side is the wrong side.

Rule discharged, without costs.

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The following case, decided in *Trinity* term 1838, may conveniently be introduced here.

HALL against MAULE and STREAT.

DECLARATION in prohibition stated (in substance) that defendants, on 13th *July* 1833, prosecuted a plea in the Consistory Court of *Bristol* against plaintiff, and thereby alleged that defendants, as churchwardens of the parish of *St. Philip and Jacob*, partly in the county of *Gloucester* and diocese of *Bristol* and partly in the city of *Bristol* and diocese aforesaid, did articulate and propound that, the parish church and churchyard of *St. Philip and Jacob*, and the chapel called the *Holy Trinity* in the same parish, standing in need of repairs, and a church-rate having become requisite to defray that and other expenses proper to the office of the churchwardens, a meeting of the churchwardens and select vestry of the parish, pursuant to notice duly given, was held on 22d *March* 1833, and a rate of 1s. in the pound was made, for the purposes aforesaid, on the inhabitants, occupiers, &c. of lands, tenements, &c., within the said parish, rateable for the purposes aforesaid, and was confirmed and allowed by the Surrogate, and paid by most of the parishioners of the said parish therein rated: that plaintiff was a parishioner and inhabitant of the said parish, and occupied a messuage or tenement within it, and was, by the said rate, duly rated, in respect thereof, at 10s., which he had been requested to pay, but refused: and defendants prayed

The Spiritual Courts have power to construe a statute, the effect of which comes incidentally before them in the course of a proceeding where they have jurisdiction. Therefore, where, on objection taken to a declaration in prohibition, on general demurrer, it appeared only that, in a proceeding to enforce a church rate, the Spiritual Court would have to determine the effect of an act of parliament, this Court gave judgment for the defendant in prohibition, on the ground that the Spiritual Court did not appear to have done any thing as yet, and it was not to be presumed that they would construe the statute erroneously. And, under such circumstances, this Court would not give leave to amend for the purpose of raising the question here on the effect of the statute.

that

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that he might be condemned in 10s., and costs, and compelled to due payment, &c.: That plaintiff afterwards exhibited and filed exceptions to the libel, alleging that, in *March* 1832, the rate-payers of the parish of *St. Philip* and *Jacob*, partly in &c., voted for, and none against, the adoption of stat. 1 & 2 *W. 4. c. 60*, (Sir *John Hobhouse's* Act for the regulation of vestries,) in manner and form as the said act prescribed: that notices of the adoption of the act (more particularly stated in the exceptions) were forthwith given, whereby the act immediately became the law for electing vestrymen and auditors of the said parish: that, on 21st *May* 1832, a meeting of the parishioners of the said parish of *St. P.* and *J.*, duly qualified according to the act, was duly held, at &c. in the said parish, for the first election of vestrymen, at which meeting, *J. D.*, *J. C.*, *G. H.*, and *R. B.*, for the In Parish of *St. P.* and *J.*, and *T. V.*, *W. N.*, *E. S.*, and *J. G.*, for the Out Parish of *St. P.* and *J.* aforesaid, being one third part in number of the existing vestry, the same then claiming and pretending to be, and acting as, a select vestry of the same parish, or the nearest number thereto, were determined by lot to retire; and the parishioners elected certain other persons (named) to be vestrymen for the In Parish and Out Parish respectively, according to the act: that the churchwardens, vestrymen, and parishioners of *St. P.* and *J.* were not duly assembled in vestry on 22d *March* 1833, for that notice was not given in the parish church of the day of holding the vestry, nor written notice affixed on the church door, as required by stat. 58 *G. 3. c. 69. (s. 1.)*: that, though *J. C.* and *E. S.* had retired by lot on 21st *May* 1832, yet they, with the churchwardens and others pretending to be, but not being, the legal select vestry, proceeded, on 22d *March* 1833,

1833, to make the rate: The exceptions, as recited in the declaration, then alleged that the rate was made for purposes not legal; that it was extortionate: and that it was for purposes some of which the inhabitants were not rateable for. The declaration then stated that the exceptions so filed were duly admitted by the said Court, viz. on 28th *December* 1833: and, because the several matters in the exceptions were not subjects of ecclesiastical cognisance and jurisdiction, but only proper to be tried in the temporal courts, the plaintiff prayed judgment for a writ of prohibition.

First plea (a). That notices of the holding of the vestry were duly given (the particulars of which were detailed in the plea); that, before the making of the rates, a statute passed (38 G. 3. c. 69., local and personal, public) reciting that the parish of *St. P. and J.*, and the parish of *St. George*, in the county of *Gloucester*, were formerly one parish, called the parish of *St. Philip* and *Jacob*; reciting also that, by stat. 24 G. 2. c. 37., a certain district of that part of the parish which lay in *Gloucestershire*, and was called the Out Parish of *St. P. and J.*, was divided from the other part, and formed into a distinct parish under the name of the parish of *St. George*; and enacting that the Out Parish of *St. P. and J.* and the parish of *St. George*, as to the maintenance of the poor and other matters therein specified, should be separated from each other, and each maintain its own poor: that from thenceforward the Out Parish had maintained its own poor separately from the In Parish, whereof it was still a part except for the purposes aforesaid; and that the Out Parish was a place maintaining its own poor according

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(a) As to pleading double in prohibition, see *Hall v. Maule*, 4 A. & E. 283.

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to stat. 1 & 2 *W. 4. c. 60.*; that no requisition was signed or delivered by any rate-payer of the Out Parish to any of the churchwardens of *St. P. and J.*; to ascertain, according to stat. 1 & 2 *W. 4. c. 60.*, whether or not the majority of the rate-payers of the Out Parish wished the said act to be adopted therein, or any requisition whatever relative to the adoption or non-adoption of the act. Verification.

Replication. That so much of the parish of *St. P. and J.* as is severally within the city of *Bristol* and within the county of *Gloucester* was respectively called the In Parish and Out Parish; and that, from the passing of stat. 38 *G. 3. c. 69.* hitherto, and still, the In Parish and the Out Parish constituted one entire parish for all purposes, except maintenance of the poor, repairs of highways, and rates for those purposes, and all taxes (other than the land tax) granted by parliament or otherwise, and were subject to the same church rates and all parochial rates and assessments (except as before); and such rates, &c., were rated and levied on the inhabitants of the Out Parish and In Parish without distinction; and the affairs and concerns of the In Parish and Out Parish were (except as before) managed by the same parish officers, and by the same vestry, being the vestry of and for the parish of *St. P. and J.*, partly &c.; that, from the passing of 38 *G. 3. c. 69.*, there had not been any distinct vestry or governing body for managing the affairs of either the Out Parish or the In Parish apart from the other, nor had the inhabitants of the Out Parish had any direction of their parochial affairs (except as before) apart from the inhabitants of the In Parish; that, before the rate-payers of *St. P. and J.* voted for the adoption of stat. 1 & 2 *W. 4. c. 60.*, to wit on &c., a requisition to the churchwardens

churchwardens of *St. P.* and *J.*, partly &c., according to the act, requiring them to ascertain the adoption or non-adoption thereof by the said parish, was signed by upwards of fifty, viz. fifty-nine, rate-payers within the true intent and meaning of the act; that they were rate-payers and parishioners of the whole parish of *St. P.* and *J.*, lying partly &c., and signed the requisition without distinction or regard to the part of the parish inhabited by them; that the requisition, before the adoption of the act was voted for, viz. on &c., was delivered to *H. A.* and *J. D.*, then churchwardens of *St. P.* and *J.*, partly in &c., *H. A.* more particularly acting for the In Parish and *J. D.* for the Out Parish; that both churchwardens received the requisition, and proceeded thereupon according to the act, and gave notice to the rate-payers of the said parish as by the act required, to signify their votes for and against the adoption; and the rate-payers of the parish of *St. P.* and *J.*, partly in &c., thereupon voted duly for the adoption of the act. Verification.

General demurrer, and joinder.

Third plea. (After stating the relation of the In Parish and Out Parish, by reference to the first plea) That no one of the rate-payers of the Out Parish voted for the adoption of the act.

Replication. (After stating the relation of the two parts of the parish, as in the replication to the first plea) That, on the occasion of the rate-payers of *St. P.* and *J.* voting for the adoption of the act, divers, to wit 600, of the said rate-payers so voting for the adoption of the act were inhabitants of the Out Parish, rated to the relief of the poor, without this, that no one of the rate-payers of the Out Parish voted for the adoption of the act. Conclusion to the country.

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Demurrer (assigning special causes which were not insisted upon), and joinder.

Peacock for the defendants (a). First, the replication is bad, because, on the facts shewn, the In Parish and Out Parish could not adopt the Vestry Act, 1 & 2 W. 4. c. 60., under sect. 7, as explained by sect. 41, each maintaining its own poor separately. Even if the parishes could concur, the requisition does not appear, on either replication, to have been signed by any parties rated to the poor in the Out Parish; which is a fatal defect in substance. Secondly, the declaration shews no ground for a prohibition. It does not appear that the Spiritual Court has done any thing beyond admitting the exceptions. They have jurisdiction in the main subject matter, church-rates; and have generally power to try whatever is incidental to any matter in which they have jurisdiction. The exceptions to this are cases where the matter to be tried (as, for instance, custom or prescription) requires a mode of proof which the Spiritual Courts do not apply, or where the doctrines, or rules of construction, in the Spiritual Courts are known to be different from those adopted in the common law Courts; *Churchwardens of Market Bosworth v. The Rector of Market Bosworth* (b), *Com. Dig. Prohibition*, (G 23.), *Goddin v. Wainwright* (c), *Starkey v. Berton* (d). [Lord Denman C. J. In *Gould v. Gapper* (e), after sentence in the Spiritual Court, it was contended that prohibition did not lie for any thing not apparent on the face of the

(a) This case was argued on *Tuesday, May 29th*, and *Friday, June 1st*, 1838, before Lord Denman C. J., Littledale, Patteson, and Williams, Js.,

(b) 1 *Ld. Raym.* 435.

(c) *Hardres*, 510.

(d) *Cro. Jac.* 234.

(e) 5 *East*, 345.

libel;

libel; but this Court looked into the whole proceedings, and, finding that an act of parliament had been wrongly construed in the Spiritual Court, incidentally to a matter upon which that Court had jurisdiction, they directed the prohibition to stand.] The distinction then made was, that, although the Spiritual Courts had a right incidentally to construe a statute, yet a prohibition would issue if they construed it contrary to law. Here no construction has as yet been made. *Byerley v. Windus* (a) was relied on in moving for the rule for this prohibition; but there the Spiritual Court would have had to try a prescription. *Chesterton v. Farlar* (b) is an authority for the defendants.

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Godson, contra, was desired to address himself to the second point. The plaintiff, according to stat. 1 W. 4. c. 21. s. 1., has not set out minutely the libel and other proceedings; in other respects the precedent in *Blacket v. Blizzard* (c) has been followed; and enough appears to shew that the real question which the Spiritual Court would have to decide, on these proceedings, would be, who are the proper vestrymen of the parish under the statutes referred to. That is a question which does not fall within the spiritual jurisdiction. In *Blacket v. Blizzard* (c) this Court interfered, the Spiritual Court having taken upon itself to put a construction on a statute. In *Byerley v. Windus* (d) the rule as to the time at which this Court will interfere, is thus laid down by *Bayley J.* "And this brings me to the second question, whether the proceedings are in such a state in the court below as to warrant a pro-

(a) 5 B. & C. 1.

(b) Antè, p. 713.

(c) 9 B. & C. 851.

(d) 5 B. & C. 21.

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hibition *at present*. Where the Spiritual Court has jurisdiction over the subject-matter, it will have jurisdiction equally, whether the claim is founded upon prescription or upon any other right; it is only when the Spiritual Court is proceeding *towards the trial of the prescription* that a claim by prescription furnishes ground for a prohibition. If the prescription is admitted, the Spiritual Court may go on with the cause; and this was the foundation of the consultation in *Jacob v. Dallow* (a). But when once it appears by the proceedings in the Spiritual Court, that the prescription, instead of being admitted, is disputed, and that the parties are in progress to bring its existence to trial, the courts of common law are not bound to wait till the parties have incurred the expense of *putting it in issue*, but the prohibition is grantable *at once*; and it was upon this principle that the prohibitions were granted in *Darby v. Cosens* (b), and in *French v. Trask* (c). Here it is already apparent that the Spiritual Court will have to construe acts of parliament. In *Cockburn v. Harvey* (d) the Court interfered on the principle now contended for. [Patteson J. In *Blacket v. Blizzard* (e) it was alleged that the Spiritual Court "admitted the libel," though prayed to reject it. That must mean more than merely allowing it to be exhibited, as here. Lord Denman C. J. It seems to have been assumed there that the Spiritual Court had actually come to a decision (which this Court considered erroneous) on the statute. Whether or not the Spiritual Court was only in progress of considering the question, seems not to have been dis-

(a) 2 Salk. 551. S. C. 2 Ld. Raym. 755.

(b) 1 T. R. 552.

(d) 2 B. & Ad. 797.

(c) 10 East, 348.

(e) 9 B. & C. 851.

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cussed. It is perfectly consistent with all which you shew here, that there may be no disputed question of fact, and that the Spiritual Court may decide rightly on the statute. You had better let the proceedings go on till they reach the stage at which they were in *Blacket v. Blizard* (a). Then, if the Spiritual Court construe the act erroneously, the case will be like that, and like *Gould v. Gapper* (b).] If the Court take that view, the plaintiff in prohibition requests leave to amend, so as to bring the question into a course for the decision of this Court. [*Patteson J.* We cannot amend without assuming a power which we have not, as the Spiritual Court has yet done nothing.]

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Per Curiam,

Judgment for defendants.

(a) 9 B. & C. 851.

(b) 5 East, 345.

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January 12th.

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(In the Matter of EDWARDS.)

A local act empowered the mayor, bailiffs, and burgesses of a borough to appoint, and also from time to time to displace and remove, a collector of quay and harbour duties, which were to be paid to the mayor, bailiffs, burgesses, and commonalty, under the act, for goods exported and imported, &c. : they were also enabled to allow such collector a salary out of the duties. The act recited that the

mayor, bailiffs, burgesses, and commonalty had, time out of mind, received and managed such duties as trustees; and it prohibited their being applied to any purpose but those of the quay and harbour, &c. The fund arising from such duties had, in fact, always been kept distinct; and the corporation had exercised no control over it, except for the purposes of the local act. E. was appointed collector, at a salary, under that act.

After the passing of stat. 5 & 6 W. 4. c. 76., the council, elected for the borough, continued the office of collector, but appointed another person in place of E.

Held, that E. was not entitled to compensation by stat. 5 & 6 W. 4. c. 76. s. 66., as a person removed from his office under the provisions of that act.

Quære, whether, before his removal, he was an officer of the borough, within the meaning of s. 66.?

A RULE nisi was obtained last term for a *mandamus* to the mayor, aldermen, and burgesses of the borough of *Poole*, to prepare and execute a bond under the common seal of the borough, conditioned for payment of the yearly sum of 42*l.* 9*s.* 10*d.* to *Francis Edwards*, and to deliver to him the bond so executed.

The rule was obtained on affidavits, stating that *Edwards* was nominated *December* 3*d.*, 1834, and appointed, *February* 4*th.*, 1835, to the office and duty of collector of certain duties on goods imported into and exported out of the harbour of the town and county of the town of *Poole*, and on ballast and boomage, &c. The appointment, annexed to the affidavit, recited the first section and some other clauses of the local act, 29 G. 2. c. 10. (a), and then proceeded: "Now we the mayor, bailiffs

(a) Stat. 29 G. 2. c. 10, is entitled "An act for the better ascertaining, recovering and collecting certain duties payable upon the importation and exportation of goods and merchandises into or out of the harbour of the town and county of *Poole*; and also of ballast and boomage duties, payable in respect of ships and vessels coming into and going out of the said harbour; and for the enlarging, better repairing and keeping in repair,

bailiffs, and burgesses of the said town and county of *Poole* do, under and by virtue of the said recited act, and under our hands, or under the hands of the major
part

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repair, the said harbour, and the quays and wharfs; and for providing a proper place for keeping gunpowder in or near the said town; and for establishing and regulating a nightly watch; and enlightening the streets in the said town." Sect. 1 is as follows. "Whereas the mayor, bailiffs, burgesses and commonalty of the town and county of the town of *Poole* have, time out of mind, received and been entitled to receive certain duties called petty customs or wharfage, upon the importation and exportation of all goods and merchandises into and out of the harbour of *Poole* aforesaid, from the owner, importer or exporter of such goods and merchandises, and also certain other duties called boomage and ballast duty, from the masters or commanders of ships and vessels; which said several duties have been constantly under the management of the mayor, bailiffs and burgesses of the said town and county of the town of *Poole*, as trustees and managers; and the said duties have been applied for the repairing the said harbour, quays and wharfs, and other works necessary for the more convenient use of the same, within the said town and county: And whereas several persons have refused to pay the said duties, induced thereto by the great difficulties in supporting, by strict legal evidence, prescriptive claims and rights to duties on each particular species of goods, and the exact and precise sums payable for the same: And although the said mayor, bailiffs, burgesses and commonalty have brought several actions, in order to establish such their ancient rights; yet, by means of the expenses in carrying on such suits, and the many continued evasions and refusals of payment, the money raised by such duties is not sufficient to repair the said harbour, quays and wharfs, which are now in a ruinous condition, and will be entirely destroyed, if not timely prevented: for remedy whereof, be it enacted," &c., "That from and after the 24th day of *June* 1756, there shall be paid to the mayor, bailiffs, burgesses, and commonalty of the said town and county of the town of *Poole* aforesaid, as well by the said mayor, bailiffs, burgesses, and commonalty of the said town and county for the time being, in their natural capacities, as by all and every other person or persons whatsoever, for all goods, wares, merchandises, and commodities imported into and exported from and out of the said harbour of *Poole* aforesaid, and for all ships and vessels coming into the said harbour, the several and respective rates, duties, and customs, mentioned, specified, and enumerated in the table or schedule hereunto annexed, and no other rates, customs, or duties, for the same or in respect thereof," &c. (the schedule to be taken as part of the act.) "And also that it shall and

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part of us assembled at the *Guildhall*, in the said town and county," &c., "nominate and appoint *Francis Edwards* of the said town and county, gentleman, to be collector, to ask, demand, require, collect, and receive the several rates, duties, and customs by the said act directed to be paid and levied, with the powers, privileges, and authorities incident to, or in any way belonging to, the office under and by virtue of the said act: and, in consideration of the services to be done and performed

may be lawful to and for the said mayor, bailiffs, and burgesses of the said town and county of the town of *Poole*, or the major part of them for the time being, whereof the mayor to be one, from time to time to assemble, and being so assembled by any writing or writings under their hands or the hands of the major part of them so assembled, to nominate or appoint one or more person or persons to collect the said rates, duties, and customs, directed to be paid and levied by this act, and also in like manner to nominate and appoint a person to execute and perform the office and duty of a quay master within the said harbour of *Poole*, and also in like manner to nominate and appoint a treasurer or treasurers to receive the rates, duties, and customs, of and from the collector or collectors; and also, from time to time, to displace or remove any such collector or collectors, quay-master or quay-masters, treasurer or treasurers, for the time being; and also to assign, and allow to and amongst the said officers for the time being, a reasonable salary or wages for their care and trouble, out of the rates and duties to be by them levied, collected, and received, by virtue of this present act, not exceeding 2s. in the pound."

By subsequent clauses, it is enacted that the collector and quay-master shall give security, and shall keep accounts of monies collected and received, which accounts are to be audited, and to be liable to examination by persons whose goods are subjected to duties, in manner directed by the act. That all the money to be raised by the duties shall be laid out in cleansing, enlarging, and keeping in order the harbour, and enlarging, repairing, &c., the quays, and other works necessary for the more convenient use of the same, &c., in such manner as to the mayor, bailiffs, and burgesses, or the major part of them, shall seem requisite. And the mayor, bailiffs, and burgesses, are empowered to borrow money (to a certain amount) on the credit of the duties, to be laid out (after payment of certain charges) in repairing the wharfs and quays, and cleansing the channels, in like manner as the duties are to be laid out, and to or for no other use or purpose whatsoever.

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by the said *F. E.*, we do assign and allow unto the said *F. E.* one moiety of the poundage of 2s. in the pound, payable out of the rates and duties to be collected: and we do order and direct the said *F. E.* to pay the money by him collected, and to be collected and received, as aforesaid, into the hands of *James Seager*, of the town and county of *Poole*, Esquire, the present treasurer heretofore appointed to receive the same, or to such other person or persons as the said mayor, bailiffs, and burgesses may at any time hereafter nominate and appoint for that purpose, at the end of every calendar month, or as often as they the said mayor, bailiffs, and burgesses, or the major part of them, shall direct or appoint. As witness" &c. It was further stated on affidavit, "that the office of collector of dues aforesaid is an office of profit in the borough of *Poole*; that *Edwards* continued in possession of the same, and in the perception of the profits, from the said 3d *December* 1834 till *January* 14th, 1836, when he was removed from his said office, under stat. 5 & 6 *W. 4. c. 76.*, without any just cause of complaint being assigned against him. He made a claim of compensation, under the same statute, sect. 66, which was rejected by the town council: and he thereupon appealed to the Lords of the Treasury, who made a minute (*May* 18th, 1837) awarding to him an annuity of 42*l.* 9*s.* 10*d.*, to commence from the time when he was deprived of his office, and to be paid half-yearly during his life. The minute was transmitted to the town council, who refused to comply with it.

The affidavits in answer stated that the appointment of *Edwards* was made under the local act above referred to: that before that time collectors had been removed by the mayor, bailiffs, and burgesses without

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compensation: that, although the power of appointing a collector was, before the passing of stat. 5 & 6 W. 4. c. 76., in the mayor, bailiffs, and burgesses, and is now, by that act, vested in the mayor, aldermen, and burgesses, as the governing body, of the town, county, and borough of *Poole*, under the last-mentioned act, yet the management of the quays, wharfs, and harbours, and the dues arising therefrom, the payment of officers' salaries, and all other matters relating to the quays, &c., have been since the passing of the harbour act, and still are, under the management of a quay committee elected, since the passing of stat. 5 & 6 W. 4. c. 76, out of the members of the corporation, and who have, since that period, filled up the vacancies in the said committee: that the committee keep a separate fund called the Quay Fund, over which the late corporation and present council had and have no control (as the deponents were advised), except for the purposes of the local act, and which cannot be applied to corporate purposes; and out of which the salaries of officers under the local act, and expenses accruing in respect of the quays and harbour, &c., are paid, and that the borough fund is not applicable to the payment of salaries to the collector, harbour-master, or any other quay officer: that the council of the borough, elected under stat. 5 & 6 W. 4. c. 76, did, on *January* 9th, 1836, continue the appointment of a quay committee, quay-master, and collector, and *Edwards* was not re-appointed; the affidavits denied, however, that he was removed under the late act, "as being a person entitled to compensation," but stated that the council, in the exercise of their discretion, "did not appoint" *Edwards*, who was nearly seventy years old, and subject to the gout, and that they appointed another person whom they considered fit: that the council rejected his claim

claim to compensation "on account of his not being a borough officer," and that, as they were advised, the Lords Commissioners had no power to award him compensation as collector of quay dues, and to charge it on the borough fund.

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Sir *W. W. Follett* and *Barstow* now shewed cause against the rule (a), which was supported by Sir *J. Campbell*, Attorney-General, and *Bingham*. Reference was made in the argument to the provisions of stat. 29 G. 2. c. 10., cited *antè*, p. 730. note (a); to stat. 5 & 6 W. 4. c. 76. sects. 58, 65, 66, 72, 73, and 92; and to *Rex v. The Mayor, &c., of Bridgewater* (b). The judgment delivered by the Court makes any further report of the argument unnecessary.

Cur. adv. vult.

Lord DENMAN C. J. on a subsequent day of the term (*January* 29th) delivered the judgment of the Court. Upon the argument of this case we had no doubt that the party applying for this mandamus was an officer within the meaning properly to be given to that term in the compensation clause of the Municipal Corporation Act, 5 & 6 W. 4. c. 76. s. 66.; but we were desirous of considering whether, upon the affidavits, he was an officer of the borough of Poole, and had been removed from his office under the provisions of the act. If we should be satisfied that the affirmative of both these propositions was established, we had no doubt that the Lords of the Treasury had the exclusive jurisdiction to determine on his right to compensation; and it would then be our duty to enforce by mandamus obedience to

(a) Before Lord Denman C. J., *Littledale, Williams, and Coleridge* Js.

(b) 6 A. & E. 339. S. C. 1 Nev. & P. 466.

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the award they have made; but, if either of those propositions be decided in the negative, it would be equally clear that their Lordships have not, and of course cannot give themselves, jurisdiction.

It is recited by the local act, 29 G. 2. c. 10., that the *mayor, bailiffs, burgesses and commonalty* (i. e. the whole body corporate) of *Poole* had immemorially received certain duties called petty customs or wharfage, and also certain other duties called boomage and ballast duty, which had been constantly under the management of the *mayor, bailiffs and burgesses* as trustees and managers; and that the said duties had been applied for the repair of the harbour, quays, and wharfs and other works necessary for the more convenient use of the same. Difficulties in the collecting and enforcing the payment of these duties are then recited; and for the remedy it is enacted that certain specified duties shall thenceforth be paid to the *mayor, bailiffs, burgesses and commonalty*, as well by the said *mayor, bailiffs, burgesses, and commonalty* in their natural capacities, as by all other persons under the circumstances in the act stated; and power is given to the *mayor, bailiffs and burgesses*, or the major part of them for the time being, whereof the mayor is to be one, to assemble, and, by any writing under their hands, or the hands of the major part of them so assembled, to appoint certain officers (among others a quay master), and also from time to time to displace or remove them, and to assign them reasonable salaries out of the said duties collected by virtue of the act, not exceeding 2s. in the pound. The act then provides for the manner of collecting the duties and auditing the accounts, which it gives each person, on account of whose goods any payment has been made, a right to examine; and, lastly, it specifically directs the application

tion of all the monies to be raised by the said duties to the repair and good order of the harbour, wharfs, quays, and other works connected with them. Under this act Mr. *Edwards* received his appointment as quay master, and, very shortly after the election of the town council under 5 & 6 W. 4. c. 76., was by them dismissed from his office. It was urged upon us in support of the rule, and we think correctly, that the compensation clause of this act ought to receive a liberal construction. Upon this principle, in the case of *Rex v. The Mayor, &c., of Bridgewater (a)*, when we found that the duties and emoluments of clerk to the charter justices had always been incident to the office of common or town clerk, which was clearly an office of profit within and belonging to the borough, we thought ourselves justified in holding that the compensation for the loss of that office, as it existed before the passing of the statute, ought to embrace such emoluments; for the employment of clerk to the justices had become by long usage parcel of the corporate office of town clerk, and the applicant, in that case, who had been appointed town clerk by the new corporation, but was not the clerk to the new borough justices, appeared to us not to have been re-appointed to his former office, and to have received only a partial compensation for the loss of it. Before, however, we can authorise a charge upon the borough fund, we are bound to see that the case of the applicant is brought fairly within the conditions of the statute. Upon a consideration of the authority by which Mr. *Edwards* was appointed, and the fund from which his salary was paid, we have entertained

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great doubts whether he could properly be considered an officer *of the borough*. It is unnecessary, however, to determine that question, because we are of opinion that he has not been removed under the provisions of the statute in question. By the seventy-second section of the statute, the new body corporate are made trustees for executing by the council of the borough the powers and provisions of all acts of parliament relating to the borough made before the passing of the act, other than any act made for securing charitable uses and trusts. Under this section the council become substituted in the local act for the mayor, bailiffs, and burgesses; they have the same powers and no greater; they must administer the local act, but are bound by it. If, therefore, Mr. *Edwards*, under the local act, had been appointed for life, no provision of the 5 & 6 W. 4. c. 76. would have enabled the council to remove him. They are enabled so to do only because under the local statute he was appointed to hold during pleasure, and because they are now appointed as trustees to execute the powers and provisions of the statute. The removal, therefore, is an act done by them as such, and in virtue of the powers of that statute, and is not a removal under the provisions of the 5 & 6 W. 4. c. 76.

We are not satisfied, upon the affidavits, that the removal of Mr. *Edwards* has been made without just cause. Unexceptionable reasons were stated for it upon the argument; but, without deciding that which is not properly of our jurisdiction, we may add that we have come to our conclusion with the less regret, because it seems clear that those dues out of which his salary was paid do not become a part of the borough fund; and, therefore, there would be an incongruity, almost an injustice,

injustice, in making that fund chargeable with any compensation for the loss of it.

Upon the ground, however, that he has not been removed under the provisions of 5 & 6 W. 4. c. 76., we think this rule must be discharged.

Rule discharged (a).

(a) See the next case.

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The following case was decided on the last day of this term.

Ex parte HARVEY.

SIR W. W. FOLLETT moved for a rule, calling on the town-council of the city and borough of Bath to shew cause why a mandamus should not issue commanding them to award compensation to *Thomas Harvey* under stat. 5 & 6 W. 4. c. 76. s. 66., for his loss of the office of assistant chamberlain. The following facts appeared by an affidavit of Mr. *Harvey*. On October 6th, 1794, it was resolved by the mayor, aldermen, and citizens of Bath, in common hall assembled, "That *John Mayer* be continued and employed by and under this corporation in doing the various business relative to

By a resolution of the corporation of Bath, a person was directed to attend upon and assist the chamberlain of the city in the various business of his office, under the direction of the committee for inspecting the chamberlain's accounts. The appointment was during good behaviour, at an annual

salary, payable quarterly. The person so appointed retiring, *H.* was, in 1810, requested by the then chamberlain to accept the office of assistant chamberlain; and the corporation, in common hall, on the chamberlain's statement that he wanted a person in place of the late assistant, resolved (but the resolution was not communicated to *H.*) that the chamberlain should be authorised to employ such fit and proper person to assist him in his said office as he should think proper. The chamberlain told *H.* that he was appointed, and *H.* entered upon the duties. A new chamberlain being afterwards appointed, the corporation, by a resolution in common hall, resolved that *H.* should be recommended to the new chamberlain as his assistant; and he was continued in that employment. On the passing of stat. 5 & 6 W. 4. c. 76., a new town council was appointed, and a committee named by them recommended that the office of assistant chamberlain should be discontinued, which was accordingly done.

Held, that the employment of assistant chamberlain under these circumstances was not an office for which compensation could be claimed under stat. 5 & 6 W. 4. c. 7. s. 66.

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the water-works, &c., belonging to this corporation, under the direction of the water committee; and that the said *John Mayer* do attend the said committee at all their meetings, issue their summonses, and enter their orders or resolutions from time to time as he shall be required. And that he do also attend and assist upon the chamberlain of this city in the various business of his office, under the direction of the committee appointed to inspect and examine, and report on, the chamberlain's accounts, for so long of one year as he the said *John Mayer* shall behave himself well therein, for which he is and shall be entitled to receive a salary after the rate of 70*l.* a year, to be paid to him quarterly by this corporation or their chamberlain." In 1810, *Mayer*, so being assistant to the then chamberlain, fell into difficulties; and early in that year *Clark*, the then chamberlain, asked *Harvey*, the present applicant, "to accept the said office of assistant chamberlain, and to succeed the said *John Mayer* in that office." *Harvey* assented; and, in *March* 1810, the mayor, aldermen, and citizens in common hall, resolved as follows. "The chamberlain" "having stated that he was in want of a person in the room of Mr. *John Mayer*, the assistant to the chamberlain, who is now under some pecuniary difficulties: Resolved, that the present chamberlain be, and he is hereby, authorized to employ such fit and proper person to assist him in his said office as he shall think proper." *Clark*, on the following day, told *Harvey* that he had been appointed assistant chamberlain, but did not communicate to him, nor did he know till many years after, the terms of the last mentioned resolution. *Harvey* entered upon the duties of assistant chamberlain, *March* 25th, 1810.

Clark

Clark was succeeded as chamberlain by *Slater* in *September* 1810, and on *October* 1st, 1810, the mayor, &c., in common hall resolved, "That Mr. *Thomas Harvey* of this city, accomptant, be, and he is hereby, recommended to *Thomas Slater*, Esquire, the present chamberlain and receiver of this city, to be his assistant in that office, with a salary of 100*l.* a year free from property tax, to be paid by the corporation." *Harvey* continued to exercise the office as before, in conjunction with, and as assistant to, *Slater*, without any appointment by him or any communication from him upon the subject. In 1812 he addressed the following letter to the corporation. "Gentlemen, I respectfully beg leave to represent to you that, since I have had the honour to be in your service, I have been in the receipt of the same salary as my predecessor Mr. *Mayer*, which had not been augmented since the year 1803, when it was raised from 70*l.* to 100*l.* per annum. The very great change of circumstances of every description since that period, and the increasing duties of the office, will, I trust, excuse the present application to your liberality for an advance of salary," &c. A common hall was summoned to consider the application; and by a resolution, referring to the statements in *Harvey's* letter, the salary was raised to 150*l.*

In 1820, by a resolution of the committee of the corporation for managing the water-works, *Harvey* was appointed superintendent of the water-works, and he performed that duty without any additional salary till 1827, when it was resolved by the mayor, &c., in common hall, "that the salary of the chamberlain's assistant be increased to the sum of 200*l.* per annum." *Harvey* received

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ceived the respective salaries of 100*l.*, 150*l.*, and 200*l.*, down to the time of his dismissal as after-mentioned.

Under stat. 5 & 6 *W. 4. c. 76.*, a new town council was elected for the city and borough of *Bath*: and a finance committee appointed by them made a report, recommending, among other things, that the "office" of assistant chamberlain should be discontinued. The council thereupon ordered "that the payment of the salary to the assistant chamberlain be discontinued." The order was communicated to *Harvey*, who ceased his attendance, and claimed compensation. The town clerk returned an answer, on behalf of the council, stating that his "claim to compensation for the loss of the office of assistant chamberlain" had been considered and disallowed. He then appealed by memorial to the Lords of the Treasury, stating all the above facts, and referring to sect. 66 of stat. 5 & 6 *W. 4. c. 76.*, to the resolutions of the corporation of *Bath* above set out, and to the Report of the Commissioners on the Municipal Corporations of *England* and *Wales*, in which the assistant chamberlain is mentioned as an officer of the corporation of *Bath*, and his appointment is said to be considered permanent. He received for answer a copy of a minute by the Lords of the Treasury (*May 23d*, 1837), which stated that, being advised by the law officers of the Crown that *Harvey* was not an officer of the borough within the meaning of sect. 66, and, therefore, could not claim compensation, their lordships would guide themselves by that opinion, and award that he was not entitled to compensation for the loss of his office of assistant chamberlain, and they directed an order to be prepared accordingly. *Harvey* presented a further memorial, referring to the lately decided case
(*Hil.*

(*Hil. T. 1837*) of *Rex v. The Mayor, &c. of Bridgewater (a)*: but the Lords refused to re-open their award.

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Sir *W. W. Follett* now relied upon the above-cited case, and contended that the place of assistant chamberlain, though not an office under the old charter, was nevertheless an appointment, the loss of which, on a fair construction of the act, gave a right to compensation; that the Lords of the Treasury had taken upon them to construe the statute, and had construed it erroneously; and that the mandamus ought to go, in order that the applicant might at least have a hearing.

Lord DENMAN C. J. I think the removal of this party from the employment of assistant chamberlain does not entitle him to compensation. *Rex v. The Mayor of Bridgewater (a)*, where the party by losing the office of town clerk lost a clerkship to justices, which had been incident to the former office, and claimed compensation for that which he so lost, was a very different case. Here it is as impossible to hold that the place of assistant chamberlain was an office within the act, as to say that, if the corporation had recommended the chamberlain to employ a clerk, that clerk would have had such an office.

LITLEDALE and WILLIAMS Js. concurred (*b*).

Rule refused.

(a) 6 *A. & E.* 339. *S. C.* 1 *Nev. & P.* 466.

(b) *Coleridge J.* was not in Court.

REGULA GENERALIS.

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REGULA GENERALIS.

*Saturday,
January 13th.**Hilary Term, 1st Victoria, 1838.*

IT IS HEREBY ORDERED, That, on and after the fourth day of this present *Hilary* term, all affidavits sworn before a commissioner in the country, or a Judge of assize on the circuit, be read in the several Courts of Queen's Bench, Common Pleas, and Exchequer, or before any Judge of the same, or any of the Masters thereof, in like manner as other affidavits, and without obliging the party filing them to obtain copies of the same.

IT IS FURTHER ORDERED, That all affidavits read before a Judge of any of the said Courts, or before a Master of the same, shall be filed with the Masters of the said Courts, and be alphabetically indexed; such affidavits to be delivered to the said Masters, in order to be filed, four times in the year, that is to say, the last day of each term.

(Signed) DENMAN.	J. B. BOSANQUET.
N. C. TINDAL.	E. H. ALDERSON.
ABINGER.	J. PATTESON.
J. A. PARK.	J. GURNEY.
J. LITLEDALE.	J. WILLIAMS.
J. VAUGHAN.	J. T. COLERIDGE.
J. PARKE.	T. COLTMAN.
W. BOLLAND.	

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The QUEEN *against* PEPPER.Saturday,
January 13th.

CHANNELL had obtained a rule in *Michaelmas* term last, calling upon *Henry Pepper* the younger to shew cause why an information in the nature of a quo warranto should not be exhibited against him, to shew by what authority he claimed to exercise the franchise of a burgess of the borough of *Maldon*, in *Essex*. The rule set forth three objections to the supposed claim of *Pepper* to the freedom by birth.

The affidavits gave an account of the history and constitution of the borough, which is named in sect. 2 of schedule (A.) to stat. 5 & 6 W. 4. c. 76. Statements were made to shew that *Pepper* was not entitled to his freedom by birth: but the only facts material to the point decided by the Court were the following. The corporation (called The mayor, aldermen, and capital burgesses, and commonalty of *Maldon*), from the granting of a charter of 8th October 1810, until the passing of the above act, consisted of eight aldermen, (one of whom was mayor), one recorder, one town clerk, one water bailiff, eighteen capital burgesses, and the commonalty of burgesses; *Pepper* was sworn and admitted into the freedom and liberties of the borough, in his alleged hereditary right as a burgess, on 24th September 1832; and he had subsequently voted as a burgess in the election of a member of parliament, his right to do so having been twice disputed before the revising barristers and allowed by them: but, on a subsequent revision of

A quo warranto information will not be granted for merely claiming to be a burgess of a borough, named in schedule (A.) of stat. 5 & 6 W. 4. c. 76., the party having a freedom acquired before that act, and his name being on the free-men's roll kept under sect. 5, but not on the burgess list under sect. 15, &c., nor on the list of voters under the Reform Act, stat. 2 W. 4. c. 45. s. 46.: at least if it does not appear that there is any corporate property in which he could claim an interest. Quære, whether such claim would be a ground for the information.

And it makes no material difference that he has voted for a member of parliament as such burgess, his name having

subsequently been expunged from the list of voters by the revising barrister.

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the list of voters (being the revision last before the date of the affidavit to this fact, 19th *October* 1837), the revising barrister expunged his name from that list, on the ground that he had been improperly admitted. It was not expressly stated in the affidavits that his name was still on the freemen's roll, kept under 5 & 6 *W. 4. c. 76. s. 5.*; but this was assumed in argument, on the above facts, on each side: and it did not appear that his name was on the roll of burgesses, kept under 5 & 6 *W. 4. c. 76. s. 15., &c.*

Thesiger and *C. R. Turner* now shewed cause (a). The party against whom the application is made exercises no franchise, and can exercise none. By the Municipal Corporation Act, stat. 5 & 6 *W. 4. c. 76.*, the corporate rights of all but burgesses under that act cease. It is true that, by the Parliamentary Reform Act, stat. 2 *W. 4. c. 45. s. 32.*, and sect. 4 of stat. 5 & 6 *W. 4. c. 76.*, the ancient class of freemen retained the right of voting for members of parliament. But *Pepper's* name is expunged from the list of freemen entitled to vote. There is therefore no usurpation of any office for which a quo warranto will lie. It will be contended that he may hereafter apply to be registered as a voter, and be admitted by the revising barrister: but the Court cannot grant, on such a contingency, a quo warranto to inquire by what right he holds his freedom at present. The Court, on such an application, requires that there should be an user of a franchise, not a claim merely, *Rex v. Whitwell* (b); where *Grose J.* said, "This information issues on the supposition of some usurpation on the Crown: but how can a man be said to usurp an

(a) Before Lord *Denman C. J.*, *Littledale, Williams, and Coleridge Js.*

(b) 5 *T. R.* 85.

office,

office, when he is not in possession or in the exercise of it?" *Rex v. Saunders* (a) is to the same effect, where a party claimed a right as officer of an extinct corporation. The case of the borough of *Horsham* (b) may perhaps be referred to: but there the party seems to have been in as full possession of the franchise (a claim to vote by virtue of a burgage tenement) as was possible: only it does not appear whether or not he had actually voted. But here, till something more is done, of which no probability or intention appears, *Pepper* neither makes claim nor has the possibility. By sect. 2 of stat. 5 & 6 W. 4. c. 76. the freemen have all existing rights of property reserved to them; but, supposing such right a sufficient foundation for a quo warranto (c), it does not appear that there is any such property in the case of the corporation of *Maldon*.

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Sir *J. Campbell*, Attorney-General, and *Channell*, contra. The party is still on the freemen's roll; and he has actually voted for a member of parliament in the character of burgess, which character he still retains, though he is not on the present list of the revising barrister. But he has, by remaining on the freemen's roll, at least an inchoate right to be admitted by the revising barrister on a future registration. Thus, if rejected for non-residence, he may on a future occasion fulfil the condition of residence. And he may now tender his vote at an election of a member of parliament, and such tender may afterwards be held to be a good vote by a committee of the House of Commons, under sect. 60 of stat. 2 W. 4. c. 45. He has been admitted and sworn in as a bur-

(a) 3 East, 119.

(b) Note (a) to *Rex v. Mein*, 3 T. R. 599.(c) See *Bayley J.* in *Rex v. Ogden*, 10 B. & C. 233.

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gess; that is an usurpation of the franchise, and takes the case out of the authority of *Rex v. Whitwell* (a), where the party had not been sworn in nor done any act. A swearing in of a burgess, though defective in law, was held to subject him to a quo warranto, in *Rex v. Tate* (b). Burgesses and freemen are classed with other persons having offices, in the Mandamus Act, 9 Ann. c. 20. s. 1.; and there is nothing in the Reform Act, or the Municipal Corporation Act, to take away the corporate character of a freeman, though some of the rights formerly incidental to such character are abridged.

Cur. adv. vult.

Lord DENMAN C. J., in this term (*January 30th*), delivered the judgment of the Court.

This was a rule calling on the defendant to show cause why a quo warranto should not issue against him for usurping the office of a freeman of the borough of *Maldon*. It appears upon the affidavits that he is upon the freemen's roll, but not on the burgess roll, and that his vote was expunged from the parliamentary register upon objection taken at the last revision.

He was admitted in the year 1832: and it was objected, first, that this case fell within the limitation clause of 7 W. 4 & 1 V. c. 78. s. 23., and therefore the application was out of time; but it is unnecessary for us to intimate any opinion upon that point (c), because another objection was made upon which we think the rule ought to be discharged.

(a) 5 T. R. 85.

(b) 4 East, 337.

(c) It has not been thought necessary to report the arguments on this point. 2 Selwyn, N. P. 1175; *Quo Warranto*, III. (ed. 9.) was referred to.

It

It is a well established rule in corporation law that quo warranto will not lie, unless against a party *in possession* and user of such a franchise or office as may be properly the subject of such an information; *Rex v. Whitwell (a)*. The defendant here, it was conceded, is *in possession* of no such franchise; he is a freeman, it is true; but his present rights, as such barely, are limited, by the conjoint operations of the Reform and Municipal Corporation Acts, to the sharing in the common lands or joint stock, if any, of the borough. Supposing even that, so situated, a rule might properly be made absolute against him, yet here the affidavits do not disclose, and we cannot presume, that there are any common lands or joint stock.

It was contended, however, that he had claimed to exercise the elective franchise; and, though now expunged, his name and vote might be restored on petition by an election committee, or that, at an ensuing revision, the revising barrister might place his name on the list. It may be conceded that, on either supposition, he would be put into the possession of such a franchise as a quo warranto might lie for usurping. But we have found no authority which decides that an unsuccessful claim, and the possibility of a renewed claim with success, to a franchise or office are equivalent to that actual usurped possession which the information in a quo warranto supposes: and we may add that there is no reason to presume any one of the facts upon the supposition of which the argument is founded: all legal presumptions are the other way. We ought rather to presume the decision of the revising barrister to be right, and that it will be acquiesced in.

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It was urged upon us that, unless we granted this rule, six years from the date of admission would expire before another opportunity could occur of raising the question, and so the admitted defect in his title would be cured (a). Whether, under the circumstances, such will be the case, we do not stop to inquire; for, admitting it to be so, that ought not to influence our decision upon the present state of things. The same argument was urged in *Rex v. Whitwell* (b) with the same success.

This rule must therefore be discharged

Rule discharged.

(a) Under stat. 32 G. 3. c. 58. s. 1. It is not thought necessary to report the arguments on this point.

(b) 5 T. R. 85.

Saturday,
January 13th.

The QUEEN against The Directors of the Poor
of the Parish of St. PANCRA.

By the Found-
ling Hospital
Act, stat.
13 G. 2. c. 29.,
the hospital is
incorporated by
the name of
The Governors
and Guardians
of the Hospital

for the maintenance and education of exposed and deserted young children; and has power to purchase lands, and erect or purchase buildings for such maintenance. &c.; and the lands, &c., shall be rated as in 1739; the corporation may receive, &c., as many children as they think fit; any person may bring children to be received by them in case the corporation think proper; no parochial officer is to prevent persons from so doing, nor to exercise any parochial authority in the hospital; and no settlement is gained by being received, maintained, educated, or employed therein; and the corporation has power to make by-laws.

Held, first, that the hospital is not extra-parochial.

Secondly, that this power to receive children is discretionary.

Therefore, where a woman left a parcel containing a child at the hospital, but went away before the contents were ascertained, and was not again found, and the governors, acting in conformity with their rules, refused to receive it: Held, that on such refusal (found as a fact by the jury, on trial of a mandamus, under the judge's direction) the parish of St. Pancras, within the ambit of which the hospital is, was bound to maintain the child as casual poor.

other

other purposes relating thereto," it was enacted that, from and after the appointment of directors as in the said act was mentioned, the said directors and their successors should exercise the powers of overseers of the poor, electing nominal overseers (with additional regulations set out in the mandamus); that the defendants had duly nominated two such overseers; and that a certain male child, aged about two years, on or about 11th *May* last, was found exposed and destitute within the said parish; that it was and is the duty of the directors to receive into the workhouse of the said parish, or to provide for the necessary relief and support of, the said child; and that due notice was given to the directors and nominal overseers, and the said directors were required to provide for the necessary relief and support of the said child; yet the directors, not regarding their duty in that behalf, had refused and neglected, and still do refuse and neglect, to receive into the workhouse of the said parish, or otherwise to provide for the necessary relief and support of, the said child, &c., to the damage of the said child and of one *Hannah Robins*. The writ then required the defendants to receive into the said workhouse, or otherwise provide for the necessary relief and support of, the child, now living with *Hannah Robins*, or shew cause &c.

Return. That the child was not found exposed and destitute within the said parish, as in the writ alleged, and that it was not the duty of the directors to receive &c., or provide &c.

The relator traversed both the allegations of the return.

The issue was tried before *Coleridge J.* at the *Middlesex* sittings after last *Michaelmas* term; when the following

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following facts appeared. On the morning of *May* 11th 1837, a woman rang the bell at the gate of the *Foundling Hospital*, and, on the porter's opening the gate, delivered to him a basket directed to the governor of the *Foundling*. The porter took the basket to the lodge, and almost immediately discovered that it contained the child in question. In the mean time, the woman had gone away, and she was not again found. The hospital lies within the ambit of the parish of *St. Pancras*, and is merely separated from it by the wall inclosing the premises. By order of the secretary of the hospital the child was taken to *St. Pancras* workhouse; but the directors refused to take it in; and the hospital had maintained the child ever since. The stat. 13 G. 2. c. 29. was referred to, which recites shortly the effect of the charter of the hospital; but the charter itself was not produced. It appeared in evidence that, by the regulations of the hospital, no child was received except upon the petition of the mother, and upon her personally appearing before the governors, unless the governors should specially order otherwise; and that these steps had not been taken in the present case. The learned Judge directed the jury to find for the crown, unless they were of opinion that the hospital had received the child; and he stated that this was a mixed question of law and fact; and that, in his opinion, the hospital had not received the child. The jury found for the crown; and his lordship gave leave to the defendants to move for a verdict to be entered for them.

Sir *W. W. Follett* now moved for such verdict, or for a new trial on the ground of misdirection. This child
 was

was not casual poor within the parish. In the first place, it was not deserted, for the hospital were bound to provide for it; and, secondly, the desertion at any rate did not take place within the parish, for the hospital must be considered extra-parochial. Stat. 13 G. 2. c. 29. s. 1. recites that, in compassion to the many infants which are liable to be exposed to perish in the streets, the hospital has been incorporated by the name of *The Governors and Guardians of the Hospital for the maintenance and education of exposed and deserted young children*. From this it would appear that the governors were not meant to have any option as to the receipt of children left with them, so far as their funds extended. By the same section they are empowered to purchase lands, and erect or convert buildings, "to be an hospital or hospitals for the reception of such poor and exposed children, in such manner as to the said corporation shall seem meet." It is true that sect. 5 enacts that it shall be lawful for the corporation to receive, maintain, and educate, "all or as many children as they shall think fit;" and for every person whatsoever to bring children to the hospital, "to the end that such child or children may be received, maintained, and educated by the said corporation therein, in case they shall think proper to receive the same;" and sect. 11 gives the corporation power to make by-laws: but it is inconsistent with the principle of the institution, as shewn by the words before cited, to assume that this gives them the power of arbitrary rejection, except so far as their funds are inadequate to the maintenance of the children left with them. Then sect. 2 provides that the houses and lands, purchased and hired for the purposes of the hospital, shall not be rated beyond the amount of the rates paid in 1739: sect. 5 provides that

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that no churchwarden, overseer, or other person, shall stop or molest any person bringing a child to the hospital; and, by sect. 6, no parish officer is to have any power or authority in the hospital, "nor shall have any authority to enquire concerning the birth or settlement of any such child or children, who shall be therein maintained and educated, or to place them out apprentices, or to do any other act, matter, or thing whatsoever, within such hospital," &c., except to collect taxes. The parochial authorities have, therefore, no power of preventing desertion, or of taking any measures within the hospital. And further, by sect. 7, no settlement is gained by being received, maintained, educated, or employed within the hospital. The hospital is therefore extra-parochial; and the child did not, by being deserted within it, become chargeable to the parish.

LORD DENMAN C. J. I think that what was done at the trial was perfectly correct; and that no other course could have been pursued. The maintenance of the child, as casual poor, was upon the parish, unless the burden was thrown elsewhere. No doubt the legislature might so have framed the statute as to relieve the parish; but it has not done so. It is clear that the hospital did not receive the child, that it is bound to maintain such children only as it does receive, and that it has a power to reject. I do not conceive that the result of this case is likely to be of extensive importance; for, if the porter had refused to take in the basket, no doubt could have arisen; and circumstances like the present must be of very rare occurrence.

LITTLEDALE J. The child was not brought into the *Foundling Hospital* within the rules. And the Hospital
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is within the parish: for, if the buildings were pulled down, the site would unquestionately be parochial.

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WILLIAMS J. There is no provision making the Hospital extra-parochial; and, as to the other point, the statute shews as strongly as possible that the Hospital is not bound to maintain children, except where it has adopted them by some intentional and voluntary act.

COLERIDGE J. It is perfectly clear that the Hospital is not extra-parochial. There seems to have been a bargain, when the act passed, by which the Hospital was bound to pay a certain rate. Had it been required that the Hospital should be extra-parochial, this would probably have been objected to on the part of the parish. The bargain, as made, turns out to be a bad one for the parish. The act does not apply; and the hardship supposed to arise from the exclusion of the parochial authorities cannot occur, because it is only by an adoption of a child that the Hospital can withdraw it from their superintendence. And, as to this adoption, they have a choice, as the language of sect. 5 shews. The only question, therefore, is whether they did receive the child; and clearly they did not.

Rule refused.

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Rule refused.

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Saturday,
January 18th.

The QUEEN against The Recorder of the
County of the Borough of CARMARTHEN.

Notice of appeal against a borough rate, under stat. 5 & 6 W. 4. c. 76. s. 92., must be given to the town clerk of the borough. And, though the borough be a county of itself, having quarter sessions, a recorder, and a clerk of the peace under sect. 103, notice to such clerk of the peace is not necessary.

E. V. WILLIAMS, in *Trinity* term last, obtained a rule nisi for a mandamus to the recorder of *Carmarthen*, to enter continuances to the next quarter sessions for the county of the borough of *Carmarthen*, and at such sessions to hear the appeal of *William Rogers* against a borough rate, made for the county of the said borough, in the nature of a county rate.

By the affidavits in support of the rule, it appeared that, the rate having made by the town council, the appeal was lodged at the quarter sessions of the county of the borough, held 24th *February* 1831, and was respited to the next quarter sessions, held *May* 17th; that notice of the appeal was served, in due time before the last mentioned sessions, on the respondents, being the mayor, the town clerk, the high constable of the county of the borough, and the late and present churchwardens and overseers of the parish of *St. Peter* in the county of the borough. The appeal was called on at the *May* sessions; when the respondent contended that the clerk of the peace of the borough should have been made a respondent and have had notice; upon which objection the Court refused to hear the appeal (a).

Chilton now shewed cause. The rate is imposed under sect. 92 of stat. 5 & 6 W. 4. c. 76. By that section, in order to provide for the expenses there specified,

(a) It was understood that the learned Recorder refused to hear the appeal, for the purpose of obtaining a decision of this Court upon the point raised.

the

the Council is "authorized and required from time to time to order a borough rate in the nature of a county rate to be made within their borough, and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace assembled at their general or quarter sessions in any county in *England* have within the limits of their commission by virtue of an act" &c. (stat. 55 G. 3. c. 51.), "or as near thereto as the nature of the case will admit." And further, "if any person shall think himself aggrieved by any such rate it shall be lawful for him to appeal to the recorder herein-after mentioned at the next quarter sessions for the borough in which such rate has been made," and to the county quarter sessions if there be no recorder in the borough; "and such recorder or justices respectively shall have power to hear and determine the same, and to award relief in the premises, as in the case of an appeal against any county rate." Stat. 55 G. 3. c. 51., referred to in the above section, made no provision (in sect. 14) as to notice of appeal: stat. 57 G. 3. c. 94. s. 2. provides that fourteen clear days' notice shall be given "to the parties against whose rate the appeal is to be made, *the clerk of the peace of the county*, and the hundred constable." Now, whatever may be the difficulty in cases of boroughs having no clerk of the peace, it is clear that, where there is such an officer, there must be notice to him. By sect. 103 of stat. 5 & 6 W. 4. c. 76. there must be a clerk of the peace wherever there is a recorder and a court of quarter sessions. The notice seems, in the present instance, to have been given to the town clerk under a misapprehension, produced by the offices of town clerk and clerk of the peace having

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having formerly been in most cases united in the same person, and by the town clerk having custody of the corporation documents. But the clerk of the peace is the officer of the court of quarter sessions now; not the town clerk, who is merely the officer of the council. The clerk of the peace will be the party to draw up whatever order the court may make in the appeal; and indeed it seems doubtful whether he be not the proper officer to draw up the order of the council for the rate.

E. V. Williams, contra. The reference to stat. 55 G. 3. c. 51., in sect. 92 of stat. 5 & 6 W. 4. c. 76., is made merely in respect of the power to impose the rate: then there is a power of appeal given absolutely, with no direction, by reference or otherwise, as to notice: and then there is a distinct sentence giving power to hear the appeal, and to relieve as in the case of an appeal against county rates. The appeal, therefore, requires no notice [at all]: the case is like that of county rates under stat. 55 G. 3. c. 51. No reference is made to stat. 57 G. 3. c. 94., which regulates notices; and the provisions of sect. 2 of that statute cannot be generally applied. For there are often rates in boroughs where there are no quarter sessions, and, consequently, no clerk of the peace of the borough, and where the appeal is to the justices of the county. Then, under stat. 57 G. 3. c. 94. s. 2., notice is to be given to the constable of the hundred; but in a borough there is no such officer. No grievance will be produced by the interpretation of the statute now suggested: for the recorder may establish any regulations as to notice, by his control over the practice of his own court. The persons named in stat. 57 G. 3. c. 94. s. 2. are the parties against whose rate the appeal is made,
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the clerk of the peace, as being the officer of the parties making the rate, and the constable of the hundred, as being the person who is to collect it. These circumstances are inapplicable to the case of a borough rate; for the clerk of the peace is not the officer of the parties making the rate, nor is it collected by the constable of the hundred. If any notice is to be given, the town clerk is the party to receive it; for he, being the officer of the council which makes the rate, stands in the character corresponding to that of the clerk of the peace in the case of a county rate. The circumstance that the clerk of the peace is the officer of the Court which is to hear the appeal is immaterial: in that character he can require no notice.

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Lord DENMAN C. J. I think that notice was necessary, but that sufficient notice has been given. Sect. 92 of stat. 5 & 6 W. 4. c. 76. enacts that the council shall have, for the making of a borough rate in the nature of a county rate, such powers as county justices have in quarter sessions under stat. 55 G. 3. c. 51., and then adds, "or as near thereto as the nature of the case will admit." In the case of a county rate, notice is given to the clerk of the peace, as being the servant of the parties who make the rate: in the case of a borough rate, it is the town clerk who fills that character; therefore he is the party to whom notice should be given. We are to look to principle, not to names. The act which creates the clerk of the peace imposes upon him no duties to the town council. The only effect of the notice, if delivered to him, would be that he would know what was coming on to be heard at the sessions. I should be very sorry that any doubt should exist as to the necessity of notice being given.

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LITLEDALE J. The proper notice must be given in each case. A county rate is made by the justices; and the act provides to whom the notice shall be given. Then stat. 5 & 6 W. 4. c. 76. s. 92. puts the borough rate on the footing of a county rate; we are, therefore, to see what is adapted to the circumstances of each case. In that of a county rate, the officer of the party making the rate is the clerk of the peace; in that of a borough rate, it is the town clerk. It is true that stat. 57 G. 3. c. 94. s. 2. names the clerk of the peace; but, under the Municipal Corporation Act, the clerk of the peace of a borough does not act as the clerk of the peace of a county does. The act directs that the powers for making a borough rate shall be as near to those exercised in making a county rate "as the nature of the case will admit." There is no magic in the title of clerk of the peace.

WILLIAMS J. I do not accede to the argument that no notice at all is necessary; but here a proper notice has been given, unless the town clerk was the wrong party. We are to follow the analogy of a county rate as nearly as possible. Some parts of the provisions respecting a county rate cannot be followed literally; as in the case, for instance, of the provision as to a constable of a hundred, there being no such officer in a borough. We must then approximate; and that has been done here, notice having been served on the party whose office most resembles that of the clerk of the peace of a county.

COLERIDGE J. I think that the act requires a notice, and that here a notice has been given. It would be
mischievous

mischievous to say that no notice was necessary. With respect to the three parts into which Mr. *Williams* divides the provisions of stat. 5 & 6 *W. 4. c. 76*, sect. 92, I think they may all be considered as so far connected one with the other that the analogy of a county rate must be substantially followed, and notice must be given to the party corresponding to the clerk of the peace in the case of a county rate. That party is the town clerk. The reason that, in the case of a county rate, the clerk of the peace is the proper officer to receive the notice, is that he is the officer of the court which makes the rate. Now the Municipal Corporation Act separates the power of making the rate from that of hearing the appeal against it. The council only have power to make the rate: their officer therefore must receive the notice.

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ON appeal against an order of justices, removing *William Shrubsole* from the parish of *Doddington* to the parish of *Wye*, both in *Kent*, the sessions confirmed the order, subject to the opinion of this Court on the following case.

D. and E. were removed, by an order describing them as man and wife, with their six children, named in the order of removal, to *W.* The order was

appealed against. Pending the appeal, the parish officers of *W.* instituted a suit in the Spiritual Court, to dissolve the marriage as incestuous. After this, the order was confirmed; and, subsequently, the Spiritual Court decreed the marriage incestuous, and void from the beginning to all intents and purposes. Pauper was born of the supposed marriage, before the order, but he was not named in it, and he was unemancipated, and had gained no settlement, when the order was made.

Held, that the confirmation of the order, under these circumstances, was not conclusive proof of a derivative settlement of the pauper in *W.*, on appeal against an order removing the pauper to *W.* after the decree of the Spiritual Court, but that, on such appeal, *W.* might shew, by the decree, that, since the first order, the marriage had become void ab initio, and the pauper illegitimate.

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David Shrubsole, whose settlement was in *Wye*, was married to *Elizabeth Fenn*, whose settlement was in *Kennington*, on 24th May 1813. By her he had issue *William*, the pauper, and several other children, all born during the marriage, in the parish of *Eastling*. *David Shrubsole* continued to reside in *Eastling*, with his wife and family, from the day of his marriage until June 1833, and, during this period, he frequently received relief from the parish of *Wye*.

By an order of justices, dated June 6th, 1833, he was removed from *Eastling* to *Wye*, together with his wife and six children therein named, by the description of *David Shrubsole* and *Elizabeth* his wife, and their six children (naming them); the pauper *William* was not named in the said order; but he was then unemancipated, and had gained no settlement in his own right. The churchwardens and overseers of *Wye*, at the July sessions, 1833, entered and respited an appeal, which was further respited at the *Michaelmas* sessions, 1833; and the order was confirmed at the *Epiphany* sessions, December 1st, 1833.

Before the confirmation of this order, the churchwardens of *Wye* had commenced a suit in the Arches Court of *Canterbury*, for the purpose of annulling the marriage between *David Shrubsole* and his wife; and, on 1st May 1834, the sentence of that Court (a copy of which formed part of the case (a)) was pronounced, by which the said marriage was dissolved, "as having been absolutely null and void from the beginning, to all intents and purposes in law whatsoever."

The sessions, on the present appeal, were of opinion

(a) By which it appeared that the ground of the dissolution was, that *Elizabeth* was the daughter of *David's* brother.

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that the order of removal from *Eastling* to *Wye*, having been confirmed on appeal, was conclusive of the pauper's derivative settlement in *Wye* from *David Shrubsole*, his father. The question for the opinion of this Court was, whether, in consequence of the dissolution of the marriage by sentence of the Arches Court, pronounced subsequently to the date of the order confirmed, for the removal of *David Shrubsole* and *Elizabeth* his wife to *Wye*, the settlement of the pauper is in *Eastling*, the place of his birth, or in *Wye*. The case was argued in *Michaelmas* term last (a).

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Starr and *Deedes* in support of the order of sessions. The general rule is, that an order of removal, either unappealed against or confirmed on appeal, is conclusive as to all parishes, with respect both to the settlement adjudicated upon and to all derivative settlements, whether the parties deriving the settlement be named or not, emancipated or unemancipated; and the fact of marriage is conclusively determined, and cannot again be discussed for the purpose of defeating the derivative settlements; *Rex v. Woodchester* (b), *Rex v. Silchester* (c), *Rex v. St. Mary, Lambeth* (d), *Rex v. Binegar* (e), *Rex v. Catterall* (g). [*Coleridge J.* Here the pauper was not named in the first order.] The children were not named in *Rex v. St. Mary, Lambeth* (d); and here the pauper was not emancipated and had gained no settlement. In *Rex v. Catterall* (g) *Abbott J.* and *Holroyd J.* both say that it is immaterial whether the party be named in the

(a) November 11th, 1837, before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) *Bur. S. C.* 191. *S. C. 2 Str.* 1172.

(c) *Bur. S. C.* 551.

(d) 6 *T. R.* 615.

(e) 7 *East*, 377.

(g) 6 *M. & S.* 83.

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first order or not. [Lord Denman C. J. The first order binds as to all that it decides; no more. *Cole-ridge J.* Your difficulty is, to shew that the pauper is son of the parties named in the first order; if he be not, their settlement proves nothing as to his.] He is their son if they were married; and the first order conclusively affirms the marriage. A settlement once existing cannot be got rid of, except by the acquisition of a new settlement; not even by the act of the party, per *Ryder C. J.* in *Rex v. St. Botolph (a)*; even if the party be attainted of felony, his children born after the attainder derive their settlement from the settlement which he had before attainder; *Rex v. St. Mary in Cardigan (b)*: and if, after an attainder, he purchase land and occupy it for forty days, he has a settlement which cannot be defeated; *Rex v. Haddenham (c)*. Lord *Ellenborough* there said, "If he had a defeasible estate during the first forty days, he has held the estate undefeated for more than that period, which cannot now be impeached. And whether or not the Crown could have impeached his title, he has now held the estate under a title not defeated for above forty days." It is true that this rule does not apply to a certificate, which, though conclusive between the parish granting and the parish to which it is granted (*New Windsor v. White Waltham (d)*), *Rex v. Headcorn (e)*, is not so as to strangers; *Rex v. Lubbenham (g)*: but that is because a certificate is in the nature merely of a contract, not of an adjudication in rem. The sentence of the Ecclesiastical Court declares the right after the judgment of

(a) *Bur. S. C.* 370.

(c) *15 East*, 463.

(e) *Bur. S. C.* 253.

(b) *6 T. R.* 116.

(d) *1 Str.* 186.

(g) *4 T. R.* 251.

sessions.

sessions. [Coleridge J. Does not it shew that the marriage never existed?] It is said, in 2 *Inst.* 682., "If the donees" (in tail special) "had been divorced *causâ consanguinitatis*, &c. whereby the issue was disabled to inherit, the donees should have had but an estate for life; but in that case they shall be punishable for waste, because the estate in tail was never perfect, but defeasible by divorce *ab initio*." But this does not apply, so far as the rights of third parties intervene. In *Cage v. Acton* (a) Lord Holt, in answer to an observation that a wife, after a divorce, should have her goods again, and a bond given to her before marriage would revive, agreed, "because the divorce, being a *vinculo matrimonii* by reason of some prior impediment, as pre-contract &c., makes them never husband and wife *ab initio*. But if the husband had made a feoffment in fee of the lands of his wife, and then the divorce had been, that would have been a discontinuance as well as if the husband had died; because there the interest of a third person would have been concerned; but between the parties themselves it will have relation to destroy the husband's title to the goods. And it proves no more than the common rule, *viz.* that relation will make a nullity between the parties themselves, but not among strangers." Here the rights of the parishes are affected. In *Rex v. St. Nicholas in Ipswich* (b) a settlement by apprenticeship was upheld, though, being only for four years, the indenture, under stat. 5 *Eliz. c. 4. ss. 26, 41.*, was "clearly void in the law, to all intents and purposes;" the Court holding that the indenture was made only voidable, if the parties themselves

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(a) 1 *Ld. Raym.* 521.(b) *Bur. S. C.* 91. *S. C.* 2 *Str.* 1066. *Ca. K. B. temp. Hardw.* 323.

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think fit. This decision was recognised in *Rex v. St. Gregory* (a). The sentence here, indeed, has the words "to all intents and purposes in law whatsoever;" but that means no more than the common expression "void;" per *Wilmot J.* in *Evans v. Harrison* (b). The result is, that the contract of marriage was voidable by proceedings being instituted: either husband or wife might have instituted such proceedings; *Aughtie v. Aughtie* (c): and it cannot be said that, if either had done so, and procured the sentence of the Ecclesiastical Court, and then appealed against the last order of removal (as might have been done; *Rex v. Hartfield* (d)), it was competent to either to alter all the rights which had arisen in the mean time between strangers. The marriage might have been avoided earlier (churchwardens are commended for promoting such a suit (e)); or the appeal against the first order might have been respite till the ecclesiastical suit then commenced had been determined. In the decided cases, proof of non-marriage has been considered inadmissible, on account of the previous adjudication in rem. It may be said that the Spiritual Court, of which the judgment was tendered in proof, has peculiar jurisdiction on questions of marriage: but that court is ministerial only to declare the right, which here had been already determined by a competent court: and there is no contradiction in admitting the judgment of one court as conclusive, and rejecting that of another. The sixth chapter of the *Articuli Cleri*, 9 Ed. 2. st. 1. c. 6., is as

(a) 2 A. & E. 99.

(b) *Notes of Opinions and Judgments, by Sir E. Wilmot*, p. 147.

(c) 1 Phil. Ecc. Rep. 201.

(d) Carth. 222.

(e) See *Blackmore v. Bridger*, 2 Phil. Ecc. Rep. 360.

follows.

follows. "Item, si aliqua causa, vel negotium, cujus cognitio spectat ad forum ecclesiasticum, et coram ecclesiastico iudice fuerit sententialiter terminata, et transierit in rem judicatam, nec per appellationem fuerit suspensa, et postmodum coram iudice seculari super eadem re inter easdem personas questio moveatur, et probetur per testes vel instrumenta, talis exceptio in foro seculari non admittetur. *Responsio.* Quando eadem causa diversis rationibus coram iudicibus ecclesiasticis et secularibus ventilatur," — "dicunt quod, non obstante ecclesiastico iudicio, curia Regis ipsum tractat negotium ut sibi expedire videtur, ecclesiastico iudicio non obstante" (a).

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Shee and Brett, contra. The general rule, that an order, unappealed against or confirmed, is conclusive as to all facts upon which it decides, is not disputed. That is a rule of convenience, the object of which is to prevent facts from being twice litigated, or litigated after an opportunity for disputing them has been passed over. It clearly does not apply to cases where there has been no previous opportunity of raising the question of fact. In the cases cited, to which may be added *Rex v. North Featherton* (b), the facts which were not allowed to be disputed on the second occasion existed at the time of the first dispute: but here the decision of the sessions on the first order is not disputed. When that decision was made, the children were not bastards: if nothing further had taken place, the order would have been conclusive; and, in fact, it was right as to the *then* settlement. But a new state of things has arisen from the sentence of the Spiritual Court. Indeed, the pauper

(a) See 2 *Inst.* 622.(b) 1 *Sess. Ca.* 170. pl. 154.

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may be said to have acquired a settlement since the first order. In order to acquire a birth settlement, it is not, strictly speaking, necessary that the pauper should be born a bastard in the parish, but that he should be a bastard and born in the parish. It is like the case of a removal from a parish before all requisites completing the settlement in that parish are fulfilled. Such removal is conclusive till the requisites be fulfilled; after that, the settlement in the parish may be insisted upon in spite of the order, which relates only to the state of things existing at the time of the order; *Rex v. Barham* (a), *Rex v. Amphill* (b), *Rex v. Willoughby* (c). There is another fatal objection to the order of sessions, namely, that, this being a derivative settlement, it is necessary to shew the pauper to be the son of the parties named in the order. But this fact has never been adjudicated upon; and the sentence of the Spiritual Court negatives it conclusively. It is said that the first order proves the marriage conclusively. But, the marriage having been only collaterally in question, the Spiritual Court, according to the doctrine laid down by *De Grey C. J.*, in the *Trial of the Duchess of Kingston* (d), is not bound by it; and, on the question being there raised, the order would not even have been evidence.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court.

In this case the pauper's father and mother, as man and wife, with their six children, were removed by an order, naming them, and dated in *June* 1833, from *East-*

(a) 8 B. & C. 99.

(b) 2 B. & C. 847.

(c) 4 A. & E. 143.

(d) 20 Howell's St. Tr. 538 (note).

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ling to *Wye*: an appeal was entered, and respited at the following *July* sessions; and, after another respite, the order was confirmed at the *Epiphany* sessions, *December* 31st, 1833. Pending this appeal, and before the confirmation of the order, the churchwardens of *Wye* had instituted proceedings in the Ecclesiastical Court to annul the marriage between the father and mother as incestuous; and, on the 1st *May* 1834, by a decree of that court, the marriage was for this reason dissolved, "as having been absolutely null and void from the beginning, to all intents and purposes in law whatsoever." At the date of the order the pauper was alive, but was not named in it, nor removed by it: he was born during the existence of the marriage, and, at that date, was unemancipated, and without any acquired settlement. He was now, by the order at present in question, removed to *Wye*; and the only point which we have to consider is, whether the first-named order, with proof that the pauper was born during the existence of the marriage, conclusively proves a derivative settlement for him in the parish of *Wye*. Our opinion is that it does not.

The judgment of the Court of Quarter Sessions upon the former appeal decided *directly* the settlement of the persons included in the order; and, this being a judgment in rem, was conclusive, not only between the parties, but against all the world. In order to arrive at this judgment, as to so much of it as affected the wife and children, it was necessary for the Court, and within its competence, to examine into and determine both the fact and legality of the marriage. And, although, the last mentioned matter being only incidentally within the cognisance of a temporal court, it might have seemed, according to the judgment delivered by *De Grey C. J.*

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in the House of Lords, on the *Trial of the Duchess of Kingston* (a), that the order was no evidence with regard to it in any future proceeding, yet numerous cases have decided that orders of removal, unappealed against or confirmed on appeal, are, not only evidence, but conclusive, as to all the facts mentioned in them, and which are necessary steps to the decision. Marriage and the legitimacy of children are among the facts as to which this rule has been upheld; and it has been extended to the case of a child emancipated at the date of the order, *Rex v. Catterall* (b), and even to that of children unborn at the time, *Rex v. Woodchester* (c) and *Rex v. St. Mary, Lambeth* (d). These, and many other cases, have formed a class which has settled the practice at quarter sessions; and it is so especially desirable, with regard to this branch of the law, to avoid all uncertainty and all subtle distinctions, that we should upon no account think ourselves justified in throwing any doubt upon these decisions.

The principle, however, on which these cases mainly proceed is a perfectly sound one; that a matter once examined into and decided by a competent tribunal shall not be reagitated, and in effect shewn to have been decided erroneously, upon new evidence which either could or could not have been, but in fact was not, produced upon the former hearing. And, accordingly, it is observable that, in all the cases where the conclusive effect of the former order has been disputed, it has been the object of the party tendering the rejected evidence to procure a contrary decision *upon the same state of facts*, by throwing new light upon them. Thus, for

(a) 20 *Howell's St. Tr.* 538 (note).(b) 6 *M. & S.* 83.(c) *Bur. S. C.* 191. *S. C. 2 Str.* 1172.(d) 6 *T. R.* 615.

example,

example, in *Rex v. Woodchester* (a) and *Rex v. St. Mary, Lambeth* (b), the marriages were in fact equally void at the respective dates of the prior orders as of the later; but the evidence failed to prove them so. If the new and better evidence had been admitted on the second appeals, the effect must have been, not indeed to destroy the *legal effect* of the former adjudications on the points decided, i. e. the settlements of the parties actually removed, but, by shewing them to have been erroneously decided, to take away their effect upon settlements derivative from the former; and the Courts have rightly said, the opportunity for this is past.

But, in the case now before the Court, a new state of facts has arisen since the former decision. An incestuous marriage, until avoided by the sentence of the Court Christian, is voidable only, and remains valid to all civil purposes. The judgment of the Court of Quarter Sessions, having passed before the sentence pronounced, was therefore correct in fact and in law; no alteration of the evidence consistent with the state of facts then actually subsisting ought to have made any difference in it. Had the incest *de facto* been ever so clearly made out, still the marriage must have been held valid, the children legitimate, and all the civil consequences as to the settlement of the wife and children named in the order must have followed. Whatever, therefore, has been decided upon the then existing state of facts remains unimpeached.

But the settlement of the pauper now comes in question for the first time: and it is admitted that he has no settlement in *Wye* except upon proof that he is the

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(a) *Bur. S. C.* 191. *S. C.* 2 *Str.* 1172.(b) 6 *T. R.* 615.

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legitimate son of his father. The former order, with proof of the date of his birth, is no doubt *primâ facie* evidence of his legitimacy: but suppose the appellants had tendered evidence that his father had been absent in *America* for a year before his birth, while the mother was in *England*, in order to shew him a bastard, can it be doubted that such evidence would have been receivable? It would have contravened no fact found, or matter decided, by the former order; it would merely have cut the link which connected, *primâ facie*, his settlement with that found by the former order. It does not appear to us that the evidence tendered in the present case differs at all in principle from that just supposed. The appellants admit the former case rightly decided, that the settlement was as there found, and the marriage then valid; but they say the decree of the Ecclesiastical Court shews that the pauper is, and always was, a bastard. Whatever be the conclusiveness of a former order on the facts found by it, it cannot in point of time extend beyond its date: it conclusively shews the state of facts then existing, and declares the law that results from it; but what is so shewn conclusively then may not continue; a change of circumstances may occur, to which the former finding is inapplicable.

We are of opinion, therefore, that, consistently with all the former decisions, and desiring in no way to break in upon them, the sessions were wrong in refusing the evidence tendered; that the respondents did not by their proof make out conclusively a derivative settlement in *Wye*; and, consequently, that the orders must be quashed.

Orders quashed.

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FROST *against* WILLIAMS and Another.Saturday,
January 13th.**T**RESPASS for seizing plaintiff's cabriolet and horse.

Plea (under the local act after mentioned), the general issue. On the trial before *Williams J.* at the sittings in *Middlesex*, in *Easter* term, 1836, a verdict was found for the plaintiff, subject to the opinion of this Court on a special case, which was stated, in substance, as follows.

The plaintiff was the licensed proprietor of the cabriolet and horse in question. They were standing for hire (the plaintiff duly attending them) in a part of *Oxford Street* which had usually, and for many years before, been a stand for hackney carriages, when defendants seized and took them away from plaintiff, and impounded them for seven days against his will. The commissioners of stamps had licensed a waterman to the stand in question; and such license was in force at the time of the seizure. These facts were admitted by the defendants: the following facts were admitted by the plaintiff.

The plaintiff's cabriolet and horse were standing for hire, at the time of the seizure, in a part of *Oxford Street*, in the parish of *St. Marylebone*, *Middlesex*, prohibited by the rules and regulations for the standing of hackney coaches in *Oxford Street*, as set forth and ordered by the vestry of *St. Marylebone*. The above-

liable to seizure under stat. 57 G. 3. c. xxix., local and personal, public (M. A. Taylor's Act), s. 65., not being within the exemption there given to carriages standing for hire according to the statutes.

Quære, whether a licensed cabriolet be within the exemption given by the last-mentioned clause to "such coaches, chariots and chaises as have been or shall be hereafter licensed" &c.

The power of regulating hackney coach stands, given to the vestry of *St. Marylebone* by the local act, 35 G. 3. c. 73. s. 95., is not superseded by the General Hackney Coach Act, 1 & 2 W. 4. c. 22.

Quære, whether, in the absence of such local authority, stat. 1 & 2 W. 4. c. 22. gives liberty to ply with hackney carriages in any place within the limits subject to that act?

Quære, whether, by stat. 1 & 2 W. 4. c. 22. s. 30., the commissioners of stamps have authority to appoint stands for hackney carriages?

A hackney carriage standing in the highway, contrary to regulations made by the vestry, under stat. 35 G. 3. c. 73. s. 95., is

(M. A. Taylor's Act)

mentioned

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mentioned rules and regulations were duly made and promulgated; and, before the seizure, notice was duly given to the plaintiff to remove such cabriolet and horse according to the sixty-fifth section of stat. 57 G. 3. c. xxix. (local and personal, public), and he did not remove them pursuant to such notice. The vestrymen of *St. Marylebone* have the control of the pavements in that parish. The defendants were employed by the vestrymen. The cabriolet and horse were not standing during the necessary time of taking up or setting down any fare, or waiting for passengers by whom they had been actually hired, or for the purpose of harnessing or unharnessing the horse. By stat. 35 G. 3. c. 73. certain vestrymen are appointed for the management of divers matters in the parish of *St. Marylebone*, and, amongst other things, for paving, repairing, cleansing, and lighting the said parish; and, by sect. 95 of the said act, it is enacted as follows.

“And whereas both hackney coachmen and hackney chairmen frequently take their stands with their coaches and chairs in such part of a square or street as to occasion considerable obstructions both on the carriage and footways, be it therefore enacted, that from and after the said 5th day of *June*” (1795), “the said vestrymen may direct and regulate such stands as they shall in their discretion think proper, within the limits afore-said” (described in sect. 40.); “and if any hackney coachman or hackney chairman shall not comply with such regulations, he or they shall forfeit and pay the sum of 10s. for every such offence.”

In pursuance of the above enactment, the vestry, on the 29th *August* 1835, duly made certain regulations respecting hackney coach stands within their jurisdiction,

tion, by which regulations, amongst other things, they directed that no hackney carriage should be allowed to stand for hire in certain parts of *Oxford Street* therein specified. The defendants justified the seizure under the above-mentioned regulations, and stats. 35 G. 3. c. 73., and 57 G. 3. c. xxix. s. 65. The points made for the plaintiff were: That the acts in question did not give the defendants any authority to seize; That stat. 35 G. 3. c. 73. s. 95. only authorised the plaintiff being summoned and fined 10s. (if that act is not in effect repealed); That the sixty-fifth section of stat. 57 G. 3. c. xxix. excepts hackney coaches from the operation of that act; That the hackney coach act, 1 & 2 W. 4. c. 22., gives a right for hackney coaches and cabriolets to stand in any part of the public highway in the county of *Middlesex*; That the ninety-fifth section of 35 G. 3. c. 73. is virtually repealed by the general hackney coach act, 1 & 2 W. 4. c. 22., and that therefore the right to make the regulation ceased on the passing of that act; And that the local act does not apply to cabriolets. The question for the opinion of the Court was, whether, under the acts in question, the defendants had the right to seize the plaintiff's cabriolet and horse (a).

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The

(a) The material clauses of the statutes referred to in the arguments and judgment are the following.

Stat. 9 Ann. c. 23. was entitled "An Act for licensing and regulating hackney coaches and chairs; and for charging certain new duties" &c.

Sect. 1 enabled the Queen to appoint commissioners for regulating and licensing hackney coaches. Sect. 16 enacted, "That for the better regulating and ordering such persons who shall be licensed to keep hackney coaches or chairs, as aforesaid, and to prevent any disturbances, and other inconveniences in the streets and highways, where such coaches or chairs shall stand or be driven, or such chairs shall stand or be carried, and for punishing thereof; it shall and may be lawful for the said commissioners, or the major part of them, from time to time, to make such orders, by-laws

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The case was argued in *Trinity* term, 1837 (a), by Sir J. Campbell, Attorney-General, for the plaintiff, and Hill for the defendants. It is not deemed necessary to report

(a) June 6th. Before Lord Denman C. J., Littledale, Patteson, and Williams Js.

and ordinances to bind such persons only, who shall have licenses to keep hackney coaches or chairs, and to annex such reasonable penalties and forfeitures for the breach thereof, as to them in their discretions shall seem fit, so as such orders, by-laws, or ordinances be made agreeable to the true intent and meaning of this act, and be for the better putting in execution thereof, and for the good government and regulation of the persons licensed to keep coaches and chairs, and so as they do not contain anything repugnant to the laws of the realm."

Sect. 17 provided that such rules, orders and by-laws shall be approved by the Lord Chancellor, Chief Justice of either Bench, and Chief Baron, or any three of them; "and after such allowance the same shall be printed and made public; and the breach of any of the rules and orders appointed by this act, and the penalties thereupon, and the rules, orders and by-laws to be made by the said commissioners, and allowed, as aforesaid, and the forfeitures and penalties thereupon, shall be punishable, and inflicted, and put in execution, by any justice of the peace, mayor, bailiff, or other magistrate of the county, city, or place where such offence shall be committed, in as full and ample manner as the said commissioners, hereby to be appointed, might do the same, and as if the said by-laws, rules, and orders were particularly inserted in this present act; but no person shall be twice punished for the same offence."

Stat. 35 G. 3. c. 73. is entitled "An Act for repealing certain acts of 8, 10, 13, and 15 G. 3., for regulating the nightly watch and beadles, and for paving, repairing, cleansing, and lighting, the parish of St. Marylebone, in the county of Middlesex, and for the better relief and maintenance of the poor thereof, and for divers other purposes therein mentioned; and for making more effectual provision for those purposes.

Sect. 2 constitutes certain persons, appointed and to be appointed as in the act is mentioned, vestrymen of the said parish for carrying the act into execution.

Sect. 95, giving power to the vestrymen to direct and regulate hackney coach-stands, and imposing a forfeiture for breach of the regulations, is set out in the case, *antè*, p. 774.

Sect. 96 gives power to a justice of Middlesex or Westminster to convict upon any complaint made to him "touching any offence or offences punishable by or under this act, to be committed within the limits aforesaid,

report the argument, the material points of the case being fully discussed in the judgment of the Court.

Cur. adv. vult.

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said, by any" master or driver of a hackney coach, or chairman of a hackney chair.

Stat. 55 G. 3. c. 159. was entitled, "An Act to amend several acts relating to hackney coaches; for authorising the licensing of an additional number of hackney chariots; and for licensing carriages drawn by one horse." Sect. 4 empowered the commissioners for licensing and regulating hackney coaches, with the approbation and direction in writing of the Lords of the Treasury, or any three or more of them, to license such number of carriages with two wheels and drawn by one horse, as should be specified in any such approbation and direction; and it enacted that "all orders, rules, regulations, by-laws, penalties, forfeitures, clauses, provisions, matters and things, contained in any act or acts of parliament relating to hackney coaches or chariots in the cities of *London* and *Westminster* shall extend and apply to and be put in force in relation to all such licensed carriages, and the owners and drivers thereof, and to all persons using the same, in like manner in every respect, and as fully and effectually, as if the same were in this act severally and respectively re-enacted and repeated in relation to such carriages, and as if the said carriages had been included in the said acts."

Stat. 57 G. 3. c. xxix. (local and personal, public), commonly called *Michael Angelo Taylor's Act*, is entitled "An Act for better paving, improving and regulating the streets of the metropolis, and removing and preventing nuisances and obstructions therein."

Sect. 65 enacts that if any person "shall set out, lay or place" "any coach, cart, wain, waggon, dray, wheelbarrow, handbarrow, sledge, truck or other carriage upon any of the said carriage ways, (*except such coaches, chariots and chairs as have been or shall be hereafter licensed by the commissioners for regulating and licensing hackney coaches, chariots and chairs, and which stand for hire according to the statutes and by-laws made for those purposes,*) and also except for the necessary time of loading or unloading any cart, wain, waggon, dray, sledge, truck or other carriage, or taking up or setting down any fare, or waiting for passengers when actually hired, or harnessing or unharnessing the horses from any coach, cart, wain, waggon, dray, sledge, truck or other carriage;" "and shall not immediately remove all or any such matters or things, being thereunto required by any surveyor or surveyors of pavements, or by any other person or persons employed or appointed by the commissioners, trustees or other persons having the control of the pave-

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Lord DENMAN C. J. now delivered judgment as follows.

The question stated for the consideration of the Court in this case depends upon the construction of several acts

ments in any parochial or other district," one of the justices there described may, on complaint, summon the offender, or the owner or owners of the coaches, &c., or other carriages, and, on the oath of a witness or witnesses, convict the party, who shall forfeit for the first offence 40s., and for subsequent offences any sum not exceeding 5l. ; and also it shall and may be lawful to and for any person or persons appointed or to be appointed by the said commissioners or trustees or other persons as aforesaid for that purpose, without warrant or other authority than this act, to seize any such coach, &c., or other carriage, together with the horse or horses, &c., and cause the same to be removed to such place as in that section is mentioned, giving notice to the owner, &c., if present; and the same shall be there kept till the penalty is paid with charges, &c. ; and, if the said carriage, &c., be not claimed, and the penalty and charges paid, within five days, the commissioners &c. may order the same to be appraised and sold, and directions are given for disposal of the proceeds.

Sect. 137 is as follows. " Provided always, and be it further enacted, that all and every the clauses, provisions, articles, matters and things in this act contained, and applying or relating to any commissioners or trustees having the control of the pavements in any streets or public places in any parochial or other district within the jurisdiction of this act, shall also extend and apply to, and all the powers, privileges, indemnities and authorities hereby conferred upon them shall and may be exercised and enjoyed by all and every other persons having the control of the pavements in the streets or public places in any parochial or other district within the jurisdiction of this act, under and by virtue of any local act or acts of parliament or otherwise;" " any thing contained in such local act or acts to the contrary notwithstanding; and that they and every of them shall and may have, exercise and enjoy all such powers, privileges, indemnities and authorities, in such and the same manner as if every such public body and such persons was or were distinctly and separately enumerated, nominated and set forth in this act," &c.

Sect. 138 enacts, that this statute shall not repeal any act relating either exclusively to the paving or repairing the pavements of the streets or public places in any parochial or other district within the jurisdiction of this act, or relating thereto, jointly with any other object; but the commissioners, trustees or other persons having the superintendence of the

acts of parliament which were passed at different times and for different purposes, and not in *pari materiâ*, nor connected with each other.

The first act is 35 G. 3. c. 73., by the ninety-fifth section of which the vestrymen of the parish of *St. Marylebone* were empowered to direct and regulate such stands for hackney coaches and chairs as they in their discretion should think proper within their limits; and the penalty for not complying with their regulations was 10s.

At that time the statute 9 *Anne* c. 23. was in force, which (sect. 16) authorised the commissioners of hackney coaches to make by-laws for their regulation; and many other general acts respecting hackney coaches had been subsequently passed. This Court decided, in the case of *Rex v. Rawlinson (a)*, that vestrymen under a precisely similar local act might not only regulate the conduct of hackney coachmen at the stands, but might appoint and limit the number and locality of the stands

the pavement under such acts, shall retain their powers, and may from time to time and at all times act under and upon the provisions, clauses, powers and authorities of such acts, or of this act, as they from time to time, upon each occasion, may think proper and deem most expedient.

Stat. 1 & 2 W. 4. c. 22. is entitled "An Act to amend the laws relating to hackney carriages, and to waggons, carts, and drays, used in the metropolis; and to place the collection of the duties on hackney carriages and on hawkers and pedlars in *England* under the commissioners of stamps."

Sect. 1 repeals, from January 5th, 1832, (with certain exceptions) a number of acts there specified, and, among them, stat. 9 *Ann.* c. 23., so far as it relates to the licensing or regulating of hackney coaches or chairs, and the whole of stat. 55 G. 3. c. 159. Stat. 35 G. 3. c. 73. and stat. 57 G. 3. c. xxix. are not mentioned.

Several other sections of this act were referred to in argument; but it is unnecessary to notice them particularly.

(a) 6 B. & C. 23.

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within the limits of their act. The statute 55 G. 3. c. 159., which first established carriages with two wheels and drawn by one horse, puts them in all respects upon the same footing as hackney coaches, and (sect. 4) expressly enacts that all laws and statutes applicable to the one class shall be equally so to the other. The recent statute 1 & 2 W. 4. c. 22. has repealed the statute 9 Anne, but has not in direct terms repealed the 35 G. 3.; nor do we find any of its provisions to be inconsistent with that act. Without, therefore, giving any opinion whether the statute 1 & 2 W. 4. in general authorises hackney carriages to ply wherever their drivers please (*a*), or whether the commissioners have any general power to appoint stands (*b*), as they certainly have to license watermen to particular stands, we think that the power of the vestrymen under stat. 35 G. 3. c. 73. is not superseded, and that they had full authority to make the regulations by which the use of the stand in question was prohibited. The plaintiff, therefore, was wrong in using that stand, and no doubt became liable to the penalty of 10s. under 35 G. 3. c. 73. But the question is, whether the defendants were authorized to seize the plaintiff's cabriolet on that account. The statute 57 G. 3. c. xxix. (local and personal, public) s. 65. enacts that, if any person shall set, lay, or place any coach or other carriage upon any of the said carriage ways (except such coaches, chariots and chairs as have been or shall be hereafter licensed by the commissioners for regulating and licensing hackney coaches, chariots and chairs, and which stand for hire

(*a*) In support of this proposition, the Attorney-General referred to sects. 4, 35, 37, 51, 54.

(*b*) Sects. 7 and 30 were cited as supporting this proposition.

according



according to the statutes and by-laws made for those purposes), and shall neglect to remove them when required by the proper officers, those officers may seize them. The defendants are the proper officers: and, though some doubt was raised in the course of the argument as to the necessity of a conviction, and as to the manner in which the cabriolet in question was dealt with, we think that the question before us turns only upon the legality of the original seizure, and is purely a question as to the construction of the above clause, in the statute of 57 G. 3.

It is argued that a cabriolet is not within the exception in this clause, although it is a carriage within the enacting part of the clause. It is said that stat. 55 G. 3. c. 159. had been in operation two years when the statute of 57 G. 3. was passed; and that, if cabriolets had been intended to be included in the exception, the word "carriages" would have been used, and not merely "coaches" and "chariots." We should be sorry to find ourselves forced to adopt such construction owing to (what we must consider to be) the accidental omission of a word; but we do not feel obliged to give any positive opinion on the subject. For the purposes of the present case, we will assume that a cabriolet is within the exception, or suppose that a hackney coach had been seized; still it must be one *which stands for hire according to the statutes and by-laws made for those purposes*. We think the exception applies, not to all carriages placed under certain jurisdictions, but to such only as are actually conforming to the lawful regulations. Now the cabriolet in question stood for hire contrary to the regulation of the vestrymen, legally made under 35 G. 3. c. 73., and of which the plaintiff

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had notice. Is then that regulation a by-law within the meaning of the exception? It is to be observed that, at the time when the statute 57 G. 3. c. xxix. was passed, the 9 Anne c. 23. was in force, which speaks of by-laws to be made by the commissioners for hackney coaches, and to be approved of by the Lord Chancellor, the chief justices, and chief baron. Probably those were the by-laws in the immediate contemplation of the legislature: and the case above referred to, of *Rex v. Rawlinson (a)*, does not shew that this regulation of the vestrymen can be treated as a by-law. Still, as the vestrymen had, by statute 35 G. 3. c. 73., power to direct at what places coaches and cabriolets should stand for hire in the parish of *St. Marylebone*, and as the right of hackney coaches and cabriolets to stand for hire any where in the streets arises from statute law, not inconsistent with the statutable regulation of the vestrymen, it seems impossible to say that a cabriolet standing for hire in a place prohibited by that regulation *was standing for hire according to the statutes made for those purposes*.

It follows that the cabriolet in question was not protected by the exception in the statute 57 G. 3. c. xxix., even supposing the words of that exception to extend to cabriolets, and supposing the regulation of the vestrymen not to be a by-law within the same exception: it was, therefore, liable to seizure; and a verdict must be entered for the defendants.

Verdict to be entered for defendants.

(a) 6 B. & C. 23.

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GILLETT *against* ABBOTT.Monday,
January 15th.

COVENANT. The declaration stated that, by indenture of *March* 7th 1837, between defendant, *Sweetman, Sears, Barrett, and Holt*, of the first part, defendant, *Sweetman, Sears, and Barrett* of the second part, defendant, *Sweetman, and Sears*, of the third part, plaintiff of the fourth part, and defendant and *Coxe* of the fifth part (profert), after reciting that, by a certain other indenture bearing date on or about the 25th day of *March* 1836, and made between the several parties whose names are thereunto subscribed and whose seals are thereunto affixed (except the several persons parties thereto of the second and third parts) of the first part, the defendant and the said *Holt* of the second part, and the said *Barrett* and the plaintiff of the third part, certain covenants and provisoes were entered into by and between the said parties thereto, for the establishment and regulation of the *London Patent Cork Manufactory*, and by virtue whereof the said *Jeremiah Barrett* and the plaintiff became the trustees thereof: and also further reciting that the plaintiff was desirous of retiring and being discharged from the said trusts; and that the parties to the said first-mentioned indenture of the third part were desirous that the defendant and *Coxe* should be trustees in the place and stead of the plaintiff and *Barrett*, and that *Barrett* should also retire from the said trust: and that it had been agreed that the plaintiff should enter into such cove-

In an action of covenant for not indemnifying plaintiff against liabilities incurred by him as trustee under a former deed, to which plaintiff and defendant were parties, the declaration set out the deed of indemnity, which recited, in part, the deed of trust. Plea, that defendant did not become liable by reason of his having been trustee under the trust deed, nor was the loss complained of a consequence of the trusts, or of plaintiff's having been such trustee as aforesaid. Issue thereon.

Held, that neither the form of the issue nor the recital in the deed of indemnity entitled the plaintiff to put in the deed of trust without proof, by the subscribing witness, of its execution.

The recital, in a deed, of a

former deed between the same parties, proves (as between the parties) so much of the former deed as is recited, but no more.

nants

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nants as are in the said first-mentioned indenture after contained, and in consideration thereof should have such immediate and other release and indemnity as are thereinafter also contained; and that the defendant and Coxe had agreed to concur in the said arrangement, and to accept the said trust: the defendant did covenant, promise, and agree to and with the plaintiff, his heirs, executors, and administrators, that he, the defendant, the said *Sweetman, Sears, and Barrett*, their heirs, executors, or administrators, some or one of them should and would, &c.; the declaration then stated a covenant to indemnify plaintiff, his heirs, executors, and administrators, and his and their estate, &c., from all actions, suits, loss, costs, &c. (with an exception not material here), by reason of, or in anywise concerning, the trusts of the aforesaid deed of settlement, &c., or by reason or in consequence of his having been such trustee as aforesaid. After stating another clause of the indenture, not material here, the declaration averred performance by the plaintiff, and a breach on the defendant's part, by not indemnifying the plaintiff against a debt of the *London Patent Cork Manufactory* to Messrs. *James and Stewart*, which the plaintiff was liable to by reason of his having been trustee as aforesaid, and was compelled to pay; and that the debt was a loss, &c., by reason of the trusts, &c., and of plaintiff's having been trustee, &c., and was not within the exceptive clause.

Plea. That the Plaintiff became and was liable to the said alleged debt to the said Messrs. *James and Stewart*, by reason of his being, when the same accrued, a partner and shareholder in the said company and partnership in the said indenture and declaration mentioned,

tioned, and therein called the *London Patent Cork Manufactory*, without this that the said plaintiff was liable to the said *James* and *Stewart* for the said debt so due and owing to the said *James* and *Stewart* by reason or in consequence of his having been trustee, as aforesaid, of the said *London Patent Cork Manufactory*; or that the said loss, charge, damage, or expense, in the said declaration mentioned, was a loss, charge, damage, or expense occasioned by reason of, or concerning, the trusts of the aforesaid deed of settlement, or by reason of or in consequence of his, the plaintiff's, having been such trustee as aforesaid, in manner and form, &c. Conclusion to the country. Issue thereon.

On the trial before Lord *Denman* C. J., at the sittings in *London* after last *Michaelmas* term, the plaintiff endeavoured to shew, by parol evidence, that he had become liable to *James* and *Stewart* as trustee under the deed of *March* 1836. The Lord Chief Justice was of opinion that the deed ought to be produced, to shew that the plaintiff was authorized by it, as trustee, to contract the liability. The plaintiff being unable to prove the deed by means of the subscribing witness, and the Lord Chief Justice being of opinion that, unless proved in the ordinary way, it could not be received in evidence, the plaintiff was nonsuited.

Sir *J. Campbell*, Attorney-General, now moved for a rule to shew cause why there should not be a new trial. First, the plaintiff was not bound to prove the deed of 1836, because the execution of it, and his character of trustee under it, were admitted by the plea. And, secondly, if the plaintiff was bound to prove that deed, it

was

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was not necessary to call the subscribing witness; the recital of the deed in the indenture of *March 1837*, executed by the defendant, was sufficient proof as against him. [*Coleridge J.* It could not prove any more than was contained in the recital.] It was enough if the recital identified the deed there referred to with that which was produced. Where breaches of the condition of a bond are suggested, it is not necessary, on an inquiry of damages, to call the subscribing witness, if the bond be otherwise identified. [*Coleridge J.* Can this case be more strongly put in your favour than if the deed in question had been the very one declared upon? But, "if the defendant by his plea admit the execution of the deed, he admits so much of the deed as is stated in the declaration, but no more; and if the plaintiff seeks to prove some other recital of the deed not specified in the declaration, he must prove the execution of the deed." 2 *Starkie on Ev.* 247 (2d ed.); where *Williams v. Sills (a)* and *Watson v. King (b)* are cited.]

LITLEDALE J. A party may be trustee by verbal appointment; and such appointment may of course be proved by parol evidence: but here it was shewn, by the very deed on which the action was brought, that the appointment was by an instrument in writing; and that instrument could not be read without proving the execution. The recital of the subsequent deed admits no more than that which is recited; if the plaintiff wished to prove more, he should have called the subscribing witness. The nonsuit, therefore, was right.

WILLIAMS J. concurred.

(a) 2 *Camp.* 519.

(b) 4 *Camp.* 272.

COLERIDGE

COLERIDGE J. The precise issue was as to the character in which the plaintiff became liable. When it appeared that his liabilities were by deed, it became necessary that the deed should be produced. There was not enough recited in the subsequent deed to dispense with the production.

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Lord DENMAN C. J. The question raised by the pleadings was, whether or not the plaintiff became liable to a particular debt as trustee, by virtue of the recited deed. That rendered it necessary to prove the deed; and, unless we are prepared to over-rule the cases which have been cited, we must hold that the proof relied upon was not sufficient.

Rule refused.

CHURCH *against* The IMPERIAL Gas Light and Coke Company. *Tuesday,*
January 16th.

(In Error.)

This case is reported, 6 *A. & E.* 846.

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Tuesday,
January 16th.

TISDELL *against* COMBE.

Stat. 7 &
8 G. 4. c. lxxv.
(local and per-
sonal, public),
empowering
the Court of
Mayor and
Aldermen of
London to
make bye laws
for regulating
"the boats,
vessels, and
other craft to
be rowed or
worked" be-
tween Windsor
and Yantlet
Creek, extends
to steam-boats.
And,
The master
of a *Gravesend*
and *London*
steam-boat of
187 tons was
held liable to
the penalty im-
posed, by such
bye law, for
navigating at a
speed forbidden
by it.

TRESPASS for breaking and entering plaintiff's dwelling-house, and seizing and distraining his goods. Plea, the general issue. Issue being joined, the parties agreed, under a judge's order, to state the following special case for the opinion of the Court.

The plaintiff has been for some time the master of a *Gravesend* and *London* steam vessel called the *Star*; and the defendant is a magistrate for the counties of *Middlesex* and *Kent*, residing in *Middlesex*. On September 19th 1834, the defendant as such magistrate issued the following warrant under his hand and seal, directed to *Benjamin Blaby*, a constable duly appointed to act in the counties of *Middlesex* and *Kent*, and to all others his Majesty's peace officers for the said counties whom those might concern.

"Whereas, by a certain conviction under the hand and seal of me, *Boyce Combe*, Esquire, one of his Majesty's justices of the peace for the adjoining counties of *Middlesex* and *Kent*, acting as such for the said two counties, and being personally resident in one of the said counties, to wit in the said county of *Middlesex*, (the said respective counties being counties next adjoining the river of *Thames*,) bearing date the 22d day of *August*, A. D. 1834, one *William Tisdell*, late of *Gravesend*, in the said county of *Kent*, waterman, was and is duly convicted before me the said justice of a certain offence: for that, on the 11th day of *August* in the year aforesaid, upon the river *Thames*, between
the

the town of *New Windsor*, in the county of *Berks*, and *Yantlet Creek*, in the said county of *Kent*, the said *W. T.*, being a freeman of the company of the master, wardens, and commonalty of watermen and lightermen of the river *Thames*, and being also the master of a certain steam vessel called the *Star*, did unlawfully navigate the said steam vessel upon the said river between *London* bridge and the eastern limits of *Limehouse Reach*, to wit at the precinct of *Saint Katharine* in the said county of *Middlesex*, at a greater rate and speed than at and after the rate and speed of five miles or knots in one hour, contrary to a rule and by-law made and allowed in pursuance of an act passed in the eighth year of the reign of King *George* the Fourth, intituled, ‘An Act for the better regulation of the watermen and lightermen on the river *Thames*, between *Yantlet Creek* and *Windsor*:’ whereupon, I the said justice have adjudged the said *W. T.* to forfeit and pay for the said offence the sum of 3*l.*, to be applied as the law directs, which said sum of money the said *William Tisdell* hath neglected and refused to pay: These are therefore to command you, the said constables and peace officers, to levy the said sum of 3*l.* by distress of the goods and chattels of the said *W. T.* And I the said justice do hereby order and direct the goods and chattels, so to be distrained, to be sold and disposed of within four days next after such distress so by you taken, unless the said sum, together with the reasonable charges of taking and keeping such distress, shall be sooner paid, rendering to him the said *W. T.* the overplus of the money so to be raised, after deducting the said penalty and the expences of the said distress and sale.

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against
COMBE.

The

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TISDELL
against
COMBE.

The plaintiff had been previously convicted by the defendant as in the said warrant is mentioned. The case then stated that, by virtue of this warrant, the distress was made in plaintiff's house at *Gravesend*, September 23d, 1834, and that, to regain possession of the goods, plaintiff was obliged to pay the penalty and expences. The bye law upon which the conviction took place was made, with certain other bye laws, at a Court of Mayor and Aldermen of the city of *London*, held on 15th *April* 1828, and is in the following words:

“That no steam boat or vessel shall navigate upon the said river, between *London Bridge* and the eastern limits of *Limehouse Reach* (a), at any greater rate or speed than at and after the rate or speed of five miles or knots in an hour: and, if the owner, master, pilot, or other person having the management or command of any such steam boat or vessel, shall navigate the same within the last mentioned limits at any greater rate or speed than as aforesaid, he shall forfeit and pay for every such offence any sum not exceeding 5*l*.”

By the fifty-seventh section of stat. 7 & 8 *G. 4. c. lxxv.* (local and personal, public) intituled “An Act for the better regulation of the Watermen and Lightermen on the river *Thames*, between *Yantlet Creek* and *Windsor*,” it is enacted, “that it shall be lawful for the said Court of Mayor and Aldermen, and they are hereby empowered from time to time to make and set down in writing such rules and byelaws as they shall think proper, for the government and regulation of the freemen of the said company, and their widows and apprentices, and the boats, vessels, and other craft to be rowed or worked within

(a) It was conceded, on the argument, that the alleged offence was committed within these limits.

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the limits of this act, and to annex reasonable penalties and forfeitures for the breach of such rules and by-laws respectively, not exceeding the sum of 5*l.* for any one offence, provided the same rules or by-laws be not inconsistent with any of the laws of this kingdom, or the provisions and directions in this act contained, or any of them; and also from time to time to alter, amend, repeal, or make void such rules and by-laws, or any of them, or any rules or by-laws which shall have been made at any time or times by the said court of master, wardens, and assistants, and approved and allowed as hereinbefore and hereinafter is mentioned, so as after the making, altering, amending, or repealing thereof respectively, the said rules and by-laws to be made by the said court of mayor and aldermen, and every such alteration, amendment, and repeal of any such rules or by-laws, or of any rules or by-laws to be made, altered, or amended by the said court of master, wardens, and assistants, and approved, altered, or repealed by the said court of mayor and aldermen, be allowed as hereinbefore is mentioned."

The by-law in question was daily allowed as required by the act of parliament. The plaintiff is a freeman of the Watermen's Company. The *Star* is of the registered burden of 187 tons and a fraction. It is not licensed under sect. 41 of the above-mentioned act, but under stat. 3 & 4 *W. 4. c. 55.*; and, in its certificate of registry, is denominated a ship or vessel.

The question for the opinion of the Court was, whether the court of mayor and aldermen of *London* had authority, under stat. 7 & 8 *G. 4. c. lxxv.* to make by-laws affecting such vessels as the *Star*. If the Court should be of opinion that they had not, it was agreed

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that the plaintiff should recover 20*l.*: but, if the Court should be of a contrary opinion, then that the defendant should have judgment: the judgment, in either case, to be entered in such form as the Court should direct. The case was partly argued in the last term (*a*), and was now resumed.

Cleasby, for the plaintiff. Stat. 7 & 8 G. 4. c. lxxv. s. 57. gives a power of inflicting penalties, and must, as a penal enactment, be construed strictly. The clause empowers the court of mayor and aldermen to make by-laws for the government of “*the boats, vessels, and other craft to be rowed or worked within the limits of this act.*” Steam-boats were well known when the act was framed, and yet are not included by name. They cannot be impliedly comprehended under the general words, “*vessels and other craft,*” because the enumeration ending with them begins with “*boats,*” which are an inferior description of craft to steam-vessels; and, where an enactment begins by specifying persons or things of an inferior degree, and then adds general words, the latter words cannot be extended in construction to things or persons of a higher degree: *Archbishop of Canterbury's Case* (*b*), *Sandiman v. Breach* (*c*), *Casher v. Holmes* (*d*). So, by the words “*rowed or worked,*” the legislature does not appear to contemplate a working by such means as steam. The context of the act, in other clauses where the words now in question are used, shews that they do not refer to steam navigation. Sect. 36 forbids any apprentice to have the sole care of any “*boat or other vessel,*” unless he shall have “*worked and rowed*” on

(a) By *Cleasby* for the plaintiff, November 10th, 1837.

(b) 2 Rep. 46 b. (c) 7 B. & C. 96. (d) 2 B. & Ad. 592.

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the river as an apprentice for two years. Sect. 37 imposes a penalty on any person not a freeman or apprentice" &c., who shall "ply, or work or navigate" any "wherry, lighter, or other craft, upon the said river, from or to any place or places, or ship or vessel," &c., under certain circumstances. Craft, there, cannot mean a ship; and in *Falconer's Dictionary of the Marine* (a), "craft" is defined, "A general name for all sorts of vessels employed to load or discharge merchant ships, or to carry alongside; or return the guns, stores, or provisions of a man of war: such are lighters, hoys, barges," &c. Sect. 38 requires licences to be taken for using and working for hire "any wherry, boat, or other vessel," for carrying passengers. The vessel in question is not licensed under this clause; and she is registered under stat. 3 & 4 W. 4. c. 54., which relates to ships. In sect. 39 mention is made of any "lighter, barge, or other boat or craft;" and in sect. 40 an enumeration beginning with "lighter" and "barge" ends with "other boat, craft, or vessel." Sects. 51 to 54 contain provisions with reference to the tide, which evidently do not relate to steam-boats. Sect. 61 provides for fixing the fares to be taken by every freeman or apprentice &c. for his labour in conveying any person or persons "in a wherry or other boat." Sect. 57, which relates to the making of by-laws by the mayor and aldermen to regulate "boats, vessels, and other craft," evidently contemplates the same subjects of regulation with sect. 56, by which the master, wardens, and assistants of the Watermen's Company are empowered to make by-laws respecting "boats or other craft," without the addi-

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(a) "*A New Universal Dictionary of the Marine*," originally by William Falconer. Burney's edit. 1815.

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tion of any more general term. If the by-law in question reaches steam-boats, it must include vessels of any magnitude; for instance, *East India* ships.

Ryland, contra. The words of sect. 57, taken by themselves, are sufficient to include steam-boats. And sect 106 enacts, "That the powers given by this act to the said court of mayor and aldermen to make rules and by-laws," "shall extend and are hereby extended and may be applied to the government and regulation of the western barges, ferries, and lighters, boats and vessels of woodmongers and owners of laystalls, chalk hoys, gardeners, fishermen, and ballastmen, and all other lighters, boats, and vessels in the said river, within the limits of this act, although otherwise exempted from the provisions of this act." There is no ground for confining the term "boat" to vessels of a smaller description than steam-boats. In *Falconer's Dictionary of the Marine* "A good Sea-boat" is defined (a) to be, "a vessel that bears the sea firmly, without labouring heavily, or straining her masts and rigging." In common speech, the word "steam-boat" is applied to steam-vessels of every size. Sect. 57 speaks of boats, vessels, and other craft "rowed or worked;" the manner in which they are "worked" is immaterial. The term "vessel" clearly extends to all kinds of shipping. "Craft," as appears by the definition in *Falconer*, is a term large enough to include "hoys." And, in *Chambers's Cyclopædia*, art. *Craft*, "small vessels, such as ketches, hoys, smacks," &c. are spoken of as "small craft." It is true that no direct mention is made of steam-boats in the present act: but they were well known when it passed;

(a) Under tit. *Sea*.

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and its principal object is the security of the public in navigating the river, which object is materially promoted by subjecting these vessels to the by-laws made under sect. 57. The principle of construction that, where an enumeration begins by specifying things of an inferior description and ends with general words, those words cannot include things of a higher kind, is at least not favourable to the plaintiff here: for in sect. 57 boats are first specified, then follows the term "vessels," which applies to shipping of the higher class, and then the general words "other craft." The steam-boat in question is registered under stat. 3 & 4 W. 4. c. 55., which speaks throughout of "ship or vessel;" and it is described as a "ship or vessel" in the certificate of registry. Sect. 13 of the last-mentioned act lays down a rule for ascertaining the tonnage of "any ship or vessel propelled by steam;" but no other mention is made of steam-boats in the act: yet its general regulations are clearly meant to include them. The same observations apply to the previous registry act, 6 G. 4. c. 110.

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Cleasby, in reply. The argument on the other side, as to the construction of general words, would exclude the operation of the established rule wherever any of the specific words ran in an ascending scale. But the cases (as *Casher v. Holmes* (a)) do not warrant such a distinction. Sect. 106 of stat. 7 & 8 G. 4. c. lxxv. does not extend the operation of sect. 57: it is a proviso introduced merely to restrict the saving clauses which immediately precede. And the rule of construction

(a) 2 B. & Ad. 592.

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which has been referred to bears in the same manner on this section as on sect. 57. As to the supposed intention of the legislature to prevent mischief by steam-boats, a penal statute cannot be extended by means of such an assumption: the purview of the statute must be looked at, together with the words actually used, as in *Martin v. Ford* (a). The greater strictness is necessary here, as the act, though public for the purpose of pleading, is in its nature a private act, in favour of the Watermen's Company.

LORD DENMAN C. J. I am of opinion that this act comprehends steam-boats. They were a boat known at the time when the act passed, and the fifty-seventh section includes boats generally. No other description of "boat" is specifically mentioned in the act. I think it would be doing violence to the language used, to say that these were not comprehended. To deny a word its known and natural meaning in any instance, we ought to be quite sure that the intention was, in the particular case, not to give it that meaning; but here it is more probable that steam-boats were contemplated than that they were not.

LITLEDAL J. I am of the same opinion. 'The mischiefs occasioned by steam-boats were more likely to be considered when this act passed, than others which are provided for. If steam-boats are not what is ordinarily termed a boat, they are "vessels." Sect. 57 speaks of "boats, vessels, and other craft to be rowed or worked" within the limits mentioned; it is no matter

(a) 5 T. R. 101.

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how they are worked ; and a steam-vessel is as much "worked" as a lighter or wherry.

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WILLIAMS J. Steam-boats are not expressly mentioned in this act ; but they would not be so if the term "boat" was understood to include them when the act passed. "Vessel," at all events, includes a ship of any magnitude : and the circumstance that it also signifies things smaller than a steam-boat cannot raise any difficulty.

COLERIDGE J. It is a mistake to say that sect. 57 is a penal clause. It is a remedial enactment, though the by-laws to be made under it may be penal. Sect. 106 does not extend the operation of sect. 57 ; but its provisions and language furnish a strong argument as to the intention of the legislature in using the words which have been under discussion in the earlier clause. To say that steam-boats are included in sect. 57 is doing no violence to the language ; the violence would be in giving it an opposite construction.

Judgment for the defendant.

1888.

Tuesday,
January 16th.

TUFNELL, Clerk, *against* CONSTABLE and
Another, Executors of ROBINSON.

Covenant to invest a sum in bank annuities, or other government stock, in the corporate names of the archdeacon of C., the vicar of W., and the churchwardens of W., the dividends to be held and received by the archdeacon, vicar, and churchwardens, for the time being, in trust for the support of a parish school for poor children, and in further trust for the distribution of coals, &c., among poor persons of the parish.

Held, on general demurrer to a declaration, that an action lay upon such covenant, no impossibility of performance appearing, inasmuch as the investment might at any rate be lawfully made in the corporate names of the present archdeacon, vicar, and churchwardens.

And this, although it was suggested in argument that, by the practice at the Bank, an investment would not be received there in the above corporate names.

(Quære, whether, if this had regularly appeared, it would have been an answer to the action?)

COVENANT, on an indenture between testator of the one part, and the vicar of the vicarage or parish church of *Wormingford, Essex*, (to wit, the plaintiff, who was then and still is vicar, and who executed the indenture in that character), of the other part. The clause of the deed declared upon (as set out on oyer) was as follows.

"This indenture, made the 9th day of *February*, A. D. 1832, between *James Robinson*, of *Wormingford*, in the county of *Essex*, gentleman, of the one part, and the vicar of the vicarage or parish church of *Wormingford* aforesaid, of the other part, witnesseth, that the said *J. R.*, for himself, his heirs, executors, and administrators, doth hereby covenant, promise, and agree with and to the said vicar and his successors, that he, the said *J. R.*, shall and will, in his lifetime, and within three calendar months next after the day of the date of these presents, or that, out of his personal estate, the executors or administrators of the said *J. R.* shall and will, within six calendar months next after his decease, invest at interest, in the *Sl.* per centum consolidated bank annuities, or " other government or parliamentary stock of *Great Britain*, producing perpetual annuities, and not in annuities the duration of which is limited, "and

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in the corporate name of the vicar of the vicarage or church of, and in the corporate names of the churchwardens of, the parish of *W.* aforesaid, and in the corporate name of the archdeacon of *Colchester* in the said county, so much and such a sum of lawful money” of *Great Britain* &c., current &c., “as, when so invested as aforesaid, and immediately after such investment, will produce, by or in the yearly interest or dividend or dividends thereof, the yearly sum of 35*l.*” of lawful sterling money, free from parliamentary taxes, &c., “and that such capital or principal sum of” 3*l.* per cent. &c., “so to be purchased by investment as aforesaid, and all and singular the interest or dividends, or other yearly proceeds from the time of such investment, to become or grow due from time to time thereon, and all” sum or sums to be recovered or received by action or suit by way of damages or otherwise under these presents, and all interest, &c., of such last mentioned sum or sums, “shall be held, received, and applied, by the vicar for the time being of the said vicarage or church of, and by the churchwardens for the time being of, the parish of *W.* aforesaid, and by the archdeacon for the time being of *Colchester* aforesaid, upon and to and for the trusts, ends, intents, and purposes hereinafter expressed or declared of and concerning the same, that is to say: Upon trust to pay and apply yearly, and every year,” 10*l.* in value of the yearly interest or dividends, “in, for, and towards the support of the present parish school of and in the said parish of *W.*, raised or established for the purpose of teaching poor children of and belonging to the said parish in the principles and doctrine of the church of *England*, or, at the discretion of the said trustees, in, for, and towards
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the support of such other parish school or schools of and in the parish of *W.* aforesaid, as may at any time or times hereafter be raised or established therein for the same or the like purposes of instruction as aforesaid, such support to the said schools respectively to consist in contributing to the salaries and maintenance of the master and mistress for the time being of the same, and in the purchase of books and of other reading and writing materials, and such other articles and things as by the said trustees shall be considered necessary or proper to be used in or purchased for the purposes of the same schools respectively." There were further trusts for charitable purposes (the distribution of coals by sale at a cheap rate among the poor of the parish, giving the preference to the most needy, the supplying of blankets, &c.), which it is not necessary to specify further. And the trustees were to hold the principal fund and dividends, &c., upon trust to account to the parishioners yearly for the preceeding year's expenditure.

The breach of covenant alleged in the declaration was the not investing, within six months after *Robinson's* decease, a sum sufficient to produce 35*l.* a year, in the names specified in the deed, or in any manner; it being also averred that *Robinson* (who was stated to have lived more than three months after the execution of the indenture) did not invest in his lifetime, and that there came to the hands of defendants, as his executors, a sum more than sufficient for performance of the covenant; and that "the said plaintiff, as such vicar and trustee as aforesaid, and the said other named and appointed trustees, have always been ready and willing to accept and receive such investment as aforesaid

aforesaid in pursuance of the said covenant, and, after the death of the said *James Robinson*, to wit on the first day of *September*, A.D. 1835, requested the defendants as executors as aforesaid to make such investment:" by reason whereof, plaintiff and the other trustees have been prevented from executing the trusts as they otherwise &c., and have lost and been deprived of the dividends and interest which would otherwise, in pursuance of the indenture, have accrued to them, &c.

The defendants, after oyer given, demurred generally. The points stated in the margin of the paper-book were: "That the covenant declared on is void, and was so at the time it was entered into, in consequence of the impossibility of performing it, being a covenant to invest money in the corporate names of certain corporations sole who cannot by law take personal chattels in or by their corporate names or in their corporate character, or by perpetual succession, and further that churchwardens are not by law a corporation for the purpose of taking or holding the money covenanted to be invested: for which reasons, or one of them, no investment could, according to the intent and meaning of the deed, at any time be made by the testator or by the defendants as his executors." The plaintiff joined in demurrer.

Channell, for the defendants, insisted on the points above stated (a). On the question whether churchwardens could take or hold the money here covenanted to be invested, he referred to note (1) on *Wilbraham v.*

(a) The grounds on which the judgment proceeded render a full report of the argument unnecessary.

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Snow (a), 1 *Burn's Eccl. Law (b)*, 408, 413. tit. *Churchwardens*, and 413. note (9); *Withnell v. Gartham (c)*, judgment of Lord *Kenyon*. He urged, further, that, according to the practice at the Bank, a transfer of stock into these corporate names would not be permitted; and he contended that the present was not a case within the rule, that, if a party expressly covenants for something to be done by a third person, he must run the risk of that person's performance or non-performance; for that a covenant was here made, in direct terms, to invest in the corporate names of the churchwardens, whereas no such body corporate existed for this purpose; and the case, therefore, was the same as if none such had existed at all. He also referred to *Paradine v. Jane (d)*, where, in debt for non-payment of rent reserved by lease, the defendant pleaded that he had been expelled by an alien enemy, and therefore could not take the profits, and this was held no excuse for breach of a duty created by the party's own contract; but he contended that in that case (as also in *Bullock v. Dommitt (e)* and *The Brecknock Company v. Pritchard (g)*) the matter relied upon in excuse was subsequent to the making of the contract, and therefore the principle to be drawn from those cases would not apply to the present. Lastly, he argued that this covenant, being for the performance of a thing impossible in point of law (on which point he referred to *Com. Dig. Condition*, (D 2.), (D 3.)), was void, as impossible conditions are in the instances cited in *Com. Dig. Condition* (D 1.). And, to shew that a *covenant* to do an impossible thing.

(a) 2 *Wms. Saund.* 47 c.(c) 6 *T. R.* 396.(e) 6 *T. R.* 650.

(b) 8th. ed.

(d) *Alegn.* 26.(g) 6 *T. R.* 750.

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stands upon the same ground with the *conditions* there spoken of, he cited 1 *Shepp. Touchst.* 164 (a), (where, indeed, the editor, Mr. *Preston*, intimates a different opinion, but cites no authority), *Pullerton v. Agnew* (b), and the case of a covenant, as to wood, referred to in *Shelley's Case* (c).

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Thesiger, contra, argued, first, that, supposing performance here to be impossible, a party who had made a covenant, knowing that it could not be performed, was not therefore entitled to say that his own covenant was void; on which point he contended that the observation of Mr. *Preston*, in 1 *Shepp. Touchst.* 164, was well founded. That the Court could not know that the Bank would object to an investment in the names specified by the deed; and, even if this were so, a party covenanting for the act of a third person must oblige him to do it, or must pay damages, *Doughty v. Neal* (d). Secondly, that, although the stock could not pass to any successors of the vicar and archdeacon, it would go to their executors, *Co. Litt.* 46 b., *Fulwood's Case* (e), *Rennell v. The Bishop of Lincoln* (judgment of *Holroyd J.* (g)); and they, and the successors of the churchwardens, might hold it as tenants in common: *Litt. s.* 297.; *Co. Litt.* 190 a. That at all events there was no impossibility (unless from the supposed objection at the Bank) in now investing the stock in the names of the vicar, archdeacon, and churchwardens; and, that being so, it was not for the defendants to speculate on difficulties which might arise as to the future transmission

(a) *Preston's* ed.(c) 1 *Rep.* 98 a.(e) 4 *Rep.* 65 a.(b) 1 *Salk.* 172.(d) 1 *Saund.* 215.(g) 7 *B & C* 176.

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of it, since it lay on them to shew (if they could) that performance of the covenant *now* was impossible. But, thirdly, he contended, as to the churchwardens, that they were a corporation for the purpose of taking personal property to the use of the parish; *Ycarb. Trin. 8 Ed. 4. f. 6 B. pl. 5., Trin. 37 H. 6., f. 30 A. pl. 11., Bro. Abr. Gardein ou Master de hospitall, et Gardein d'esglise, pl. 7, Corporations et capacities, pl. 55, 73, Feoffements al uses, pl. 29.* Fourthly he cited *Paice v. The Archbishop of Canterbury (a)*, and *Mavor v. Nixon (b)*, as shewing that, whatever might be the rules respecting grants to corporations, effect might nevertheless be given to a bequest of this kind, made for charitable purposes.

Channell, in reply. *Doughty v. Neal (c)* shews that a party covenanting for a third person's act is in the same situation as if he had covenanted for his own; but not that a legal impossibility would not excuse him. Supposing an actual transfer now made to the vicar, archdeacon, and churchwardens, without regard to their capacity to take as corporations, then, if any of them took as individuals merely, the trusts would not be properly fulfilled. Churchwardens have been held a corporation for the purpose of taking goods to the use of the parish, but that was where the whole parish was interested in the property, whereas here the parish in general had no interest, or at most only an indirect one in the fund bequeathed. The cases last cited for the plaintiff, as to charitable bequests, were determined in Courts of Equity, and under circumstances not applicable here.

(a) 14 Ves. 364. 1 Russ. & Mylne, 759. note.

(b) 2 Y. & J. 60.

(c) 1 Saund. 215.

Lord

Lord DENMAN C. J. (after stating the substance of the pleadings). The objection to the plaintiff's right of action is, that the defendants cannot make the investment. But why not? No difficulty is shewn. The law may interfere with the future succession as to this property; but the defendants may invest, subject to the happening of that event hereafter. The trusts are of a charitable nature; to pay for the keeping of a school, and to lay out money in other ways for the poor. That circumstance would remove any future difficulty, because, if it arose, application might be made to a court of equity, which would take care that every thing necessary was done for giving effect to the trusts.

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LITLEDALE J. The defendants allege that they cannot invest this stock because the parties named in the bequest are not corporations for that purpose, and the investment could not be effected at the Bank. But the answer is, let them shew that they have applied at the Bank and to the proper officers, and that it is impossible to make the investment with their consent. I should say then that no sufficient answer was given, the law not forbidding the thing to be done, and there being no breach of moral duty involved in it, and the defendants being under covenant to perform it. But, if an actual impossibility were shewn, the parties might go to a court of equity to restrain proceedings in an action on the covenant, they shewing that they had done all in their power to fulfil it. The testator in this case must be taken to have known, when he covenanted, whether the law would permit a fulfilment of the covenant or not; or, perhaps it should rather be said, whether the course

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course of practice would or would not allow it to be carried into effect.

WILLIAMS J. I am of the same opinion. There has been no change of facts since the covenant was entered into. It is said that the Bank would not accept an investment in these corporate names; but that, if it were so, would be matter of defence, and no such defence in point of fact is set up. There is nothing that I know of to prevent the defendants from performing the covenant, subject to what may take place hereafter under the regulation of a court of equity. It has not been shewn that the covenant is either illegal or incapable of being enforced.

COLERIDGE J. The testator having voluntarily entered into this covenant, his executors now say that it is impossible to perform it. I do not say whether that which they attempt to allege would or would not be an answer: but at all events they do not shew anything amounting to one. All the parties in whose names the investment is, by the covenant, to be made are to some purpose corporations, and have corporate names. The money, therefore, might be invested at the Bank, unless an impossibility arose there. I should think that the investment might be carried into effect; but it is not necessary to consider this. The defendants ought to shew that by some act of parliament the Bank is precluded from allowing the investment. No moral impossibility is pointed out; and, that not being shewn, we cannot speculate on what might take place.

Judgment for the plaintiff.

1838.

WILKINS *against* HEMSWORTH.Tuesday,
January 16th.

TRESPASS for assaulting and falsely imprisoning plaintiff. Plea, Not Guilty. The cause came on for trial, before *Parke B.*, at the *Norfolk* summer assizes, 1835, when it was agreed that a special verdict should be found. The material parts of the verdict were as follows.

That on *November 5th*, 1829, plaintiff appeared before two justices of the peace in and for the county of *Norfolk* to answer a complaint of his being the father of a bastard child whereof *Sarah Aldis* had lately been delivered at *New Buckenham* in the said county; that, plaintiff not making any sufficient defence, the said two justices (after hearing the charge on oath) made, wrote, signed, and sealed two papers, one of which was as follows. The verdict then stated an order of the above two justices, whereby, after the proper recitals, they adjudged the plaintiff to be the reputed father of the child, and ordered that he should forthwith pay to the churchwardens and overseers of *New Buckenham* 15s. for and towards the lying-in of *Sarah Aldis*, and the maintenance

On application by overseers for an order of filiation, the mother and *W.*, the reputed father, being both present, two justices signed and sealed an order on the mother for payment by her of 1s. 6d. a week, and also signed and sealed an order on the reputed father for payment of the same sum. It did not appear which paper was signed and sealed first. The justices told *W.* that he was to pay 1s. 6d. a week, and delivered both papers to the overseers, directing them to keep one (not saying which), and to serve the

other on *W.* They served him with the paper charging the mother. Being afterwards summoned before a magistrate for non-payment, he produced the last-mentioned paper, and alleged that it was invalid as to him. The overseers then gave him a copy of the order kept by them, which they alleged to be the correct one, and again summoned him for non-payment; and, refusing to pay, he was committed. On action brought by him against the committing magistrate, and special verdict, stating the above facts,

Held by Lord *Denman* and *Williams Js.*, that, a correct order being produced before the defendant, and proper steps having been taken upon it, he was bound to issue his warrant, without entering into the transactions which took place when the order was made, and that he was justified by such order.

By *Tittledale, Williams, and Coleridge Js.*, that, assuming the order upon the mother to have been made first, the two justices might, at the same sitting, make another order, and declare that to be the one which they meant to enforce; and consequently that the latter order was a good justification.

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of the child to the time of making that order, and 1l. 6s. 6d. for the order and other incidental expenses. The document then continued as follows. "And we also hereby further order that the said *William Wilkins* shall likewise pay, or cause to be paid, to the churchwardens and overseers of the poor of the said parish of *New Buckenham*, the sum of 1s. 6d. weekly, and every week from the present time, for and towards the keeping, sustentation and maintenance of the said bastard child, for and during so long time as the said bastard child shall be chargeable to the said parish of *New Buckenham*. And we do further order that the said *Sarah Aldis* shall also pay, or cause to be paid, to the said churchwardens and overseers" &c., "the sum of 1s. weekly and every week so long as the said bastard child shall be chargeable to the said parish of *New Buckenham*, in case she shall not nurse and take care of the said child herself. Given," &c.

The second paper was an order of the same justices, of the same date, and in precisely the same terms, except that, in the clause directing payment of 1s. 6d. weekly, the order was "that the said *Sarah Aldis*" (instead of '*William Wilkins*') shall likewise pay," &c.

The verdict stated that the name of *Sarah Aldis* in this clause was written by mistake for that of *William Wilkins*. "And that the said Sir *Robert John Buxton* and *John Wright*" (the two justices), "when they signed and sealed the said last-mentioned paper writing, believed and intended that it should be an exact copy of the said first-mentioned paper writing." And "that the said Sir *R. J. B.* and *J. W.*, at the time they made, signed, and sealed the said paper writings, told the said *W. Wilkins* that he was thenceforth to pay to the churchwardens

churchwardens and overseers of the poor of the parish of *New Buckenham* the sum of 1s. 6d. a week for and towards the maintenance of the said bastard child; and that, immediately upon having made, signed, and sealed the said paper writings, they delivered them to the churchwardens and overseers of the said parish of *N. B.*, with directions to deliver one of them to the plaintiff, and to make the demand of the money in the said paper writings mentioned upon him, and to keep the other in the parish chest; to make a memorandum, upon the back of that which they kept, of the service of the other paper writing, according to the usual practice adopted by the magistrates of that hundred on occasions when orders and duplicate orders or copies have been made; it being left upon those occasions to the parish officers to keep one and deliver the other, without the magistrates specifying which is to be kept and which delivered." — "That the said churchwardens and overseers of the said parish of *N. B.* kept the first-mentioned paper writing in the church chest, with a memorandum indorsed thereon of the service of the other upon the said *W. Wilkins*, and that they delivered the secondly mentioned paper writing to the said *W. Wilkins* as a copy thereof." That, before leaving the magistrate's room, they demanded of *W. Wilkins* the 1l. 6s. 6d., and the 15s., which he then paid. "That the paper writing which was kept by the said churchwardens and overseers was intended by the said Sir *R. J. B.* and *J. W.* to be their original order; and that the paper writing delivered to the said *W. Wilkins* was intended to be a copy thereof. And" "that the said *Sarah Aldis* was present before the said Sir *R. J. B.* and *J. W.* on the said

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25th day of *November* 1829, at the time when the said paper writings were made, signed, and sealed by them, and delivered to the said churchwardens and overseers as aforesaid. And that it did not appear which of the said paper writings was first made, signed, and sealed by the said Sir *R. J. B.* and *J. W.*, nor whether it was before or after their being made, signed, and sealed; that they told the said *W. Wilkins*, as hereinbefore set forth, that he was thenceforth to pay to the said churchwardens and overseers of the said parish of *N. B.* the sum of 1s. 6d. a week for and towards the maintenance of the said bastard child."

The verdict then stated that, in the beginning of 1830, the overseers applied to the Plaintiff for weekly payments, then in arrear under the order, but he refused to pay, on the ground that the order which had been delivered to him was not a good order. One of the overseers then informed him that the order which had been kept by the churchwardens and overseers was the real order, and that the (the overseer) supposed the other was a copy; and in *February* 1830, the overseers served the plaintiff with a correct copy of the paper kept in the parish chest (a). In *March* 1834 one of the overseers laid an information on oath before the defendant, a justice of the peace in and for *Norfolk*, setting forth the order of the before-mentioned two justices, as requiring the plaintiff to pay 1s. 6d. weekly towards the support of the child while chargeable. Proof upon oath was given before the defendant of the order preserved in the parish chest, of due notice thereof having been given to the plaintiff, of his refusal to pay (there being 5l. 3s. 6d. due, for

(a) See *Wilkins v. Wright*, 3 Tyr. 824. S. C. 2 Gro. & M. 191.

weekly

weekly payments from *November 1832*), and of other facts necessary to support the application. The plaintiff was summoned, and appeared (*April 3d, 1834*) to answer, and the complaint on oath was then made in his presence: and "it was made to and did to the said defendant appear, as well on the oath of the said *John Rotherham*" (the overseer) "as otherwise, that the said sum of *5l. 3s. 6d.* was, on the said 3d day of *April 1834*, due and owing from the said *W. Wilkins* to the churchwardens and overseers of the poor of the parish of *N. B.*, under and by virtue of the said order so made by the said Sir *R. J. B.* and *J. W.*, and so delivered by them to the said churchwardens and overseers of the said parish of *N. B.* as aforesaid." That the plaintiff, being thereupon required by the said defendant to pay, or to shew cause for not so doing, refused to pay, and did not state any cause, "except the fact that the said paper writing so delivered to the said *W. Wilkins* stated the prospective weekly payments to be payable by the said *Sarah Aldis*, and had no reasonable or sufficient cause to shew, unless the same was a reasonable and sufficient cause:" And that the defendant thereupon adjudged the plaintiff guilty of refusing to pay the *5l. 3s. 6d.*, and ordered him to be committed to the house of correction, to hard labour, for three months, unless he should sooner pay, &c. The verdict then set out the warrant of commitment, which recited "an order made the 5th day of *November 1829*, under the hands and seals of" &c., requiring plaintiff to pay *1s. 6d.* weekly &c.; that plaintiff had due notice of such order and did not appeal; the chargeability of the child, plaintiff's default in payment, and the proceedings before defendant; and the verdict ended with an adjudication that plaintiff was

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guilty of refusing to pay, and an order for his commitment as above. The verdict then stated that plaintiff was committed under the warrant, and remained in the house of correction till &c., when he paid the 5*l.* 3*s.* 6*d.*

Kelly, for the plaintiff. First, it cannot be contended that the defendant may select one of the orders of filiation and maintenance, and reject the other. The magistrates have made two orders in the nature of duplicate originals; and the jury cannot tell which was signed and sealed first. If they form two contradictory orders, neither can be supported. Either would have been good if made first; and the magistrates, having made a good order, could not have avoided it, even if such had been their wish. [*Coleridge J.* Is there any authority for saying that the magistrates could make but one order? Stat. 18 *Eliz. c. 3. s. 2.* says that the justices "shall and may by their discretion take order" for the relief of the parish and maintenance of the child. Suppose they had at first made an order on the putative father in too small a sum; might not they afterwards have made another order for more? Here, if the order made on the father was the first, it was clearly binding; if the last, might not the justices, after making an order on the mother, make a second on the father?] Nothing appears in stat. 18 *Eliz. c. 3.* to give authority for making a second order. Looking to the documents in this case, it manifestly was not the intention of the magistrates to issue two orders, charging 1*s.* 6*d.* a week on *Wilkins* and 1*s.* a week on *Aldis*, and again charging *Aldis* with weekly payments of 1*s.* 6*d.* and 1*s.* If the two papers be considered as forming one order, there is an evident contradiction between the different parts.

In

In *Wilkins v. Wright (a)*, where the present orders were under discussion, the Court of Exchequer held that there was an order which would have justified a warrant of commitment if rightly framed; but the evidence there was, that one paper only was delivered to the parish officers, the other being handed to the plaintiff; and *Bayley B.*, in his judgment on the preliminary point, relied on that circumstance, holding that the order put into the hands of the overseers was, on that account, the original; the other being only a notice to the putative father. But on the present verdict it appears that both papers were delivered to the parish officers. Again, in *Wilkins v. Wright (a)*, the point now in question was immaterial to the ultimate decision. The case most nearly approaching the present is *Grant v. Fletcher (b)*, where a broker handed to buyer and seller notes of the contract materially differing from each other, and it was held that there was no valid contract. The orders here are analogous to the notes in that case. Considering the two orders as one instrument under seal, in which there is a manifest repugnancy, the defect cannot be cured by a parol statement like that in the special verdict, that the documents were intended to be alike. It would in any case be very dangerous that orders of magistrates should be so explained.

B. Andrews, contra. The judgment of *Bayley B.* in *Wilkins v. Wright (c)* is substantially in favour of the defendant here. In the present case there was a good

(a) 3 Tyr. 824. S. C. 2 Cro. & M. 191. Trespass against a magistrate for issuing a warrant of commitment in 1832, grounded on the orders now in question.

(b) 5 B. & C. 436.

(c) 3 Tyr. 830. 2 Cro. & M. 193.

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order against the plaintiff, under which he was liable to pay 1s. 6d. a week, and of which notice was given to him in the magistrates' room. Upon that order the defendant was bound to act. It is no matter that there was another order (made by mistake, as the jury have found) on *Sarah Aldis*. [Lord Denman C. J. It may be questioned, whether the statement as to mistake ought to have been admitted into the verdict, the alleged mistake being embodied in an order under seal.] If it is necessary so to contend, both orders may stand together. Stat. 18 Eliz. c. 3. gives power to charge the mother or reputed father; but under that clause both may be charged, and the practice has been to do so (a). The statute does not say that the orders on father and mother shall be by the same writing; the justices are to take order "in such wise as they shall think meet and convenient." It is true that, in this case, part of the order against each parent is repeated; but that might have happened if one party was brought before the justices, and an order made when the other was not yet apprehended, and then, upon the other party being taken, a second order was made. [Littledale J. It is clear that this was a mistake. The justices would not, in a second order, have repeated the first part of the order upon the father as they have here.] In point of fact, no doubt, there is a mistake. But the question is, whether such a second order could by possibility have been made. [Littledale J. According to the supposition, the father would be ordered to pay 1s. 6d. a week, and the mother also ordered to pay 1s. 6d. a week, and twice 1s. a week for nurture.] The justices might

(a) See 2 Nol. P. L. 298, 4th ed., and the authorities there cited.

make

make such an order. [*Littledale J.* In *Wilkins v. Wright (a)* *Bayley B.* considered the first order as the only one binding.] That is, in fact, so here. The verdict finds that the two justices intended the last-mentioned paper writing to be a copy of the first. It was in their discretion to make an original order and a copy; and, if it was left uncertain which was the copy, it belonged to the jury to ascertain that fact; and they have done so by stating the intention. The decision in *Wilkins v. Wright (a)* must govern the present case: under the circumstances here stated, the fact that both papers were delivered to the parish officers cannot raise any sound distinction. *Grant v. Fletcher (b)* does not apply. There the question in the cause was, whether any contract existed; and it was held that there was none, because the broker had delivered notes differing from each other, and had made no signed entry in his own book. Had there been such an entry, the contract would have held good. In the present case it is clear, at all events, that the two justices have made, and had jurisdiction to make, an order on the plaintiff. [He also argued that the defendant, having acted on his discretion in the exercise of his office as a magistrate, and within his jurisdiction, was not liable in trespass: and he cited *Mills v. Collett (c)*; but the whole Court held that this was no answer, if the order relied upon was a nullity.]

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Kelly in reply. It has not been shewn that stat. 18 *Eliz. c. 3.* empowers magistrates to make two distinct orders, that is, two judgments, on one complaint.

(a) 3 *Tyr.* 824. *S. C.* 2 *Cro. & M.* 191.

(b) 5 *B. & C.* 436.

(c) 6 *Bing.* 85.

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And, if they may, neither the contents of the paper writings, nor the other facts found in this case, are consistent with the supposition that the justices really made two distinct orders. If two have been made, then *Sarah Aldis* is liable for all the sums imposed upon her in each, and both she and the plaintiff are bound to pay 1s. 6d. a week; which cannot be contended. Again, it may be (though it is not probable) that justices may draw a single judgment on two distinct papers; but these documents cannot be read as one consistent judgment. At best, the orders are ambiguous, and could not properly be acted upon. The authority to imprison under orders of this kind is one which must be strictly pursued.

Lord DENMAN C. J. I think that the defendant in this case shews a warrant sufficient for his justification. Two justices make an order on the reputed father of a bastard to pay certain sums for expenses, and 1s. 6d. a week for maintenance; and he is informed of that order before he leaves the magistrates' room. He is at the same time served with an order, stating that the 1s. 6d. is to be paid by the mother. The order charging the plaintiff with 1s. 6d. is kept by the parish officers, and they afterwards summon him for non-payment, upon which he produces the order served upon him, requiring the mother to pay the 1s. 6d. : but then notice and a correct copy are given him of the order stated to be the real one; and he is again called upon to pay, but refuses, on account of the order first delivered to him: and then he is brought before the defendant, who commits for non-payment. The committing magistrate was not bound to go into the history of the two documents,
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or to ascertain whether or not they were made as duplicates, and whether one, and which, was intended to be a copy of the other. There was a valid order before him; he was bound to act upon it, and that is his justification.

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LITLEDALE J. I have had much doubt, but the ground on which I now decide is this. Two writings were made out; the jury do not say which was signed first, but the case may be taken as if the order charging the weekly payment on the mother had been first signed; both, at least, were signed at the same sitting. There does not appear to have been an intention to issue two orders; and the magistrates were not functi officio by having put their seal to the first, but might make a different one at the same meeting. The question then would be, which they meant to put in force; and, as to that, they informed the plaintiff that, by the order they had made, he was to pay 1s. 6d. a week. They might, if a mistake had happened, vary their order before the meeting was broken up; and it was competent to them to say which order they meant to act upon.

WILLIAMS J. I agree both with my Lord Chief Justice and with my brother *Litledale*. The principal foundation of my judgment is, that there is nothing to shew that there were two orders. The party summoned had notice of the order which was intended to take effect, by the mention made of the sum which he was to pay weekly. This case is in a great measure decided by the judgment of *Bayley B.* in *Wilkins v. Wright (a)*, where it was said that the order delivered to the parish

(a) 3 Tyr. 830. S. C. 2 Cro. & M. 193.

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officers must be considered the original order, and the other merely a notice to the reputed father. I also think, as my Lord has said, that, a valid order having been shewn to the defendant, he could not avoid issuing his warrant.

COLERIDGE J. It is clear that the plaintiff cannot succeed unless the proceeding before the two justices was a nullity. Now, suppose the order upon *Sarah Aldis* for 1s. 6d. to have been signed first, and then the order on the plaintiff for the same weekly sum; the last order is communicated to him, and he is afterwards served with a correct copy of it. Can it be said that, the justices having adjudicated on the case, and made such an order, it is to go for nothing, because, immediately before, they signed a paper ordering *Sarah Aldis* to make the payment now charged on the plaintiff?

Judgment for the defendant.

Wednesday,
January 17th.

The QUEEN *against* The Inhabitants of
HOCKWORTHY.

This case is reported, *antè*, p. 492.

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Wednesday,
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ON appeal against an order of justices removing *Sophia*, the illegitimate child of *Sophia Boswarrick* (late *Sophia Hellings*), from the parish of *Wendron*, in *Cornwall*, to the parish of *Constantine*, in the same county, the sessions quashed the order, subject to the opinion of this Court upon the following case.

The pauper is the illegitimate child of *Sophia Boswarrick*, who, before her marriage as after mentioned, was a settled inhabitant of *Constantine*, in which last-mentioned parish the pauper was born, in 1832. After her birth the pauper was placed at nurse in *Wendron*, by and in which latter parish she was relieved and maintained as a pauper before and at the time when the order of removal was made. In *November* 1835, the pauper's mother intermarried with *John Boswarrick*, of the parish of *Kenwyn*, in the said county, and a settled inhabitant of that parish; and both she and her husband have resided in *Kenwyn* ever since. The said *J. B.* and his wife, or either of them, never resided in *Wendron*. The sessions being of opinion that, by virtue of stat. 4 & 5 *W. 4. c. 76.*, the settlement of the pauper in *Constantine* was suspended, during the lives of her said mother and her husband, until she attained the age of sixteen, and that the pauper ought not to have been removed to the said parish of *Constantine*, adjudged that the order should be discharged, subject &c. The question submitted to this Court was, Whether the said pauper *S. H.* was, under the circumstances above stated,

A woman, settled in parish *C.*, bore a bastard child there before the passing of stat. 4 & 5 *W. 4. c. 76.*, and it was placed for nurture in parish *W.* She then married, and lived with her husband, in parish *K.*, the child remaining in *W.* The child, becoming afterwards chargeable to *W.* while under the age of sixteen, was removed, by order of justices, to *C.* Held, that the removal was proper, and consistent with stat. 4 & 5 *W. 4. c. 76. s. 57.*

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stated, removeable from the said parish of *Wendron* to the said parish of *Constantine*, the place of her legal settlement?

Sir *W. W. Follett*, in support of the order of sessions. By sect. 71 of stat. 4 & 5 *W. 4. c. 76. (a)*, a bastard child, born after the passing of the act, is to follow the mother's settlement, until it attain the age of sixteen, or acquire a settlement in its own right; and the mother, while unmarried or a widow, shall be bound to maintain such child as a part of her family. But, by sect. 57 (*b*), a man who, after the passing of the act, marries a woman having a child or children, whether legitimate or illegitimate, "shall be liable to maintain such child or children as a part of his family;" and "such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly." The removing justices in this case appear to

(a) Stat. 4 & 5 *W. 4. c. 76. s. 71.* enacts, "That every child which shall be born a bastard after the passing of this act shall have and follow the settlement of the mother of such child until such child shall attain the age of sixteen, or shall acquire a settlement in its own right, and such mother, so long as she shall be unmarried or a widow, shall be bound to maintain such child as a part of her family until such child shall attain the age of sixteen; and all relief granted to such child while under the age of sixteen shall be considered as granted to such mother: provided always, that such liability of such mother as aforesaid shall cease on the marriage of such child, if a female."

(b) Sect. 57. enacts, "That every man who from and after the passing of this act shall marry a woman having a child or children at the time of such marriage, whether such child or children be legitimate or illegitimate, shall be liable to maintain such child or children as a part of his family, and shall be chargeable with all relief, or the cost price thereof, granted to or on account of such child or children until such child or children shall respectively attain the age of sixteen, or until the death of the mother of such child or children; and such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly."

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have thought that, while the husband is so liable, the child may still be removed to the place of its birth settlement, the husband being no otherwise bound to maintain the child than as a putative father was under the old bastardy law; or that he was no more liable than a father or grandfather under stat. 43 *Eliz. c. 2. s. 7.* But the present act goes further, and directs that the child shall be maintained as a part of the husband's family. It is not necessary to contend that the child becomes permanently settled in the husband's parish; but its birth settlement is suspended till the age of sixteen. In *Lang v. Spicer (a)* (where the Court of Exchequer held that the putative father of a bastard born before the present statute no longer continued liable after the mother's marriage, her husband being able to maintain it) Lord Abinger C. B. considered the child so entirely a part of the husband's family that, if the child became chargeable by his inability to maintain it, he and his family would thereby become chargeable also. In *Rex v. Walthamstow (b)* the children born before the marriage, and before the passing of the act, had been removed to the husband's parish as the place of their settlement; and this Court merely determined that the children did not, by the mother's marriage, acquire the second husband's settlement. But, if the order of justices here be good, the children, while living in the husband's family, might be removed from it, and sent to the mother's settlement. [*Coleridge J.* After the age of nurture.] Here the child is within it. But the question is a general one. The object of the statute was to prevent the marriages of women having bastard chil-

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(a) 1 *M. & W.* 129. *S. C. Tyr. & G.* 358.

(b) 6 *A. & E.* 301. *S. C. 1 N. & P.* 460.

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dren, by subjecting the husband to the burden of keeping them as part of his family. And, even on a strict construction of sect. 57, if the husband is bound only to maintain the child, the words "as a part of his family" are unmeaning. The effect of the statute is, that a child is irremoveable from the mother, under sect. 71, or from the mother's husband, under sect. 57, till it attains the age of sixteen.

W. C. Rowe, contra. The child was born before the passing of the act, and, at least according to the old law, was settled by birth in *Constantine*. When the mother married, and at the time of the order of removal, the child was in a different parish from that in which the mother lived. Had it been with the mother during nurture, it could not have been separated from her, but must have gone wherever she went; and, according to *Rex v. Hemlington (a)*, it would have been maintainable, under the old law, by the parish in which it was born. But here the child was living neither with the mother nor in the parish where it was born, but in a third parish: and it is laid down in *Burn's Justice*, tit. *Poor (a)*, that, "although the child may not be separated from the mother, yet if she voluntarily desert it, it seemeth that the cause of nurture then ceaseth, and that then it may be sent to its place of settlement." To what place of settlement then was the pauper in this case to be sent? The justices could not make a conditional order; they could only send the child to the place where, according to stat. 13 & 14 *Car. 2. c. 12. s. 1.*, it was "last legally settled" "as a native." And,

(a) *Cald. 6. S. C. 1 Doug. 9*, note [2].

(b) Vol. iv. p. 430. § v. (3). *D'Oyly & Williams's* ed.

since

since the decision in *Rex v. Walthamstow* (a), it cannot be contended that, under the present act, the settlement was elsewhere than in *Constantine*, the place of birth. The late statute orders, by sect. 57, that the husband shall maintain the child "as a part of his family," and shall be chargeable with all relief granted to it during certain periods: the object of that was merely to impose the burden of maintenance upon him, not to introduce any new regulation as to settlement. Sect. 71 enacts that a bastard shall follow the mother's settlement till it attain sixteen, or acquire a settlement of its own; but there is no provision on this subject affecting the husband in sect. 57. The pauper, here, is found in *Wendron* as casual poor; the remedy, for enforcing the proper maintenance, may be a proceeding against the mother's husband as a vagrant for desertion of his family; but it ought not to be thrown on *Wendron* to take such a step, that parish being neither the place of birth nor the residence of the husband. It is not stated in the case whether or not the husband is able to maintain the child. The general question, whether the wife's children can, under any circumstances, be removed from the place of their birth settlement, as part of the husband's family, does not arise on the present facts.

Lord DENMAN C. J. The fifty-seventh section of stat. 4 & 5 W. 4. c. 76. might almost seem to make the children part of the husband's family for all purposes, even that of settlement. But the enactment is made with a view rather to relief than to settlement. By sect. 71, which directs that the mother of a bastard child shall,

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while unmarried, maintain such child as a part of her family, it is enacted that the child "shall have and follow the settlement of the mother" until &c. If a like provision had been contemplated in sect. 57, similar words would have been introduced: but that clause merely enacts that the husband shall be liable to maintain, and be chargeable with all relief granted, and that "such child or children shall, for the purposes of this act, be deemed a part of such husband's family accordingly;" that is, for the purpose of such maintenance, and of receiving such relief, if necessary, as the husband's family would be entitled to. *Rex v. Walthamstow* (a) decides that the settlement of the children is not changed, by sect. 57, to that of the husband; though the parish to which they become chargeable may call upon him for the maintenance. But the parish of *Wendron* had nothing to do with this: the husband was not there; and a proceeding against him was not their best mode of dealing with the case. The child was a pauper in *Wendron*, where it could have no right to be. Unless its birth settlement was destroyed by the statute, the parish of *Wendron* could only remove it to the place of that settlement.

LITLEDALE J. I see no objection to the removal of a child, under these circumstances, to the place of its birth settlement. The husband may maintain it as a part of his family, whether in the parish where he resides or not. The act is complied with, if an order is made on him to maintain the child, and he does so. Sect. 71 enacts that every child born a bastard after

(a) 6 A. & E. 301.

the passing of this act shall have the mother's settlement till it attains the age of sixteen, or acquires a settlement of its own: sect. 57 has no such words, nor does it introduce the limitation as to the time of birth with reference to the passing of the act.

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WILLIAMS J. The question turns mainly on the comparison of sect. 57 with sect. 71. It is a matter of considerable importance, whether the child, by being maintainable as part of the husband's family, is to be settled in his parish. If that had been intended, there would have been a clause as to settlement in sect. 57 like that in sect. 71. Then the question here is, how the child was to be disposed of? The parish of *Wendron* had nothing to do with it; its settlement was in *Constantine*. If steps were to be taken against the father, that was the parish by which they were to be adopted.

COLERIDGE J. *Lang v. Spicer* (a) decides that, under sect. 57 of this act, the putative father of a bastard is no longer liable to maintain it, at least while the mother's husband has ability to do so. Then, in a case like the present, what is to be done with the child till it attains the age of sixteen? Either it was irremovable from *Wendron*, or it was removeable to *Kenwyn*, or to *Constantine*. As to the first proposition, what provision is there in any statute, that a child shall have no settlement, and shall be a burden to the parish in which it is found, till the age of sixteen? It is true that sect. 57 of the present act throws the burden of maintenance on

(a) 1 M. & W. 129.. S. C. Tyr. & Gr. 358.

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the husband; but he may not be able to maintain it: and why is an indifferent parish to run the risk of that event, or to take upon itself the enforcing of the husband's responsibility? Then, could the child be removed to *Kenwyn*, where the husband resided? For that purpose, even according to the argument of Sir *W. Follett*, there must be a new form of order. At present, an order of removal adjudges the pauper to be settled in the parish to which the removal is made; but in case of a removal to *Kenwyn* that form would not be applicable. Then, was the removal to *Constantine* proper? That course must have been taken, because the child was still settled there, unless the settlement was suspended or destroyed by sect. 57. Now there are no words in that section which, taken literally, can have such an effect. A direction as to the child's settlement until sixteen is introduced in sect. 71, but there is nothing of a similar kind in sect. 57; no such provision, therefore, can be introduced into sect. 57 by implication. And it is safest to construe this clause according to the words as we find them. I think, therefore, that the pauper was properly removed. The parish of *Constantine* may take its remedy against the mother's husband under section 57.

Order of sessions quashed.

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PUGH *against* GRIFFITH.Friday,
January 19th.

TRESPASS. The declaration charged that defendant, on 1st *October* 1835, and on divers other days and times between &c., with force and arms &c., broke and entered a dwelling house of plaintiff, situate, &c., and made a great noise, &c., and stayed and continued therein, making such noise, &c., for a long &c., and forced and broke open, broke to pieces and damaged, divers, to wit ten, doors of plaintiff, of and belonging to the said dwelling house, and broke to pieces, damaged, and spoiled divers, to wit, twenty locks, twenty bolts, twenty staples, and twenty hinges, of and belonging to the said doors respectively, and wherewith the same were then fastened, and of great value, &c., and also, during the time aforesaid, to wit on &c., seized and took divers goods and chattels, to wit &c., of plaintiff, and carried away and converted &c.

1. Trespass for breaking and spoiling a lock, bolt and staple appertaining and fixed to the outer door of plaintiff's dwelling house, and wherewith the same was fastened. Plea, that a *fi. fa.* issued against plaintiff, and was delivered to defendant, being sheriff, by virtue whereof defendant, then lawfully being in a room of the dwelling-house occupied by *D.* as tenant to plaintiff, peaceably entered into the residue of the dwelling-house

through the door communicating between the room and the residue, the same being then open, to take in execution plaintiff's goods then in the dwelling house, and did take them; and because the outer door was shut and fastened with the lock, bolt, and staple, so that defendant could not carry away the goods or execute the writ without opening the outer door, nor open the door without breaking the lock, &c., and because neither plaintiff nor any other on his behalf was in the dwelling-house so that defendant could request plaintiff or such other to open the outer door, defendant, for the purposes aforesaid, did open the outer door, and, in so doing, did necessarily break, &c., the locks, &c., doing no unnecessary damage.

Held, on demurrer, that the plea was good, though it was not shewn how the defendant entered into the house, nor who fastened the outer door; and that it sufficiently appeared that there was no other way of getting out.

2. Where the declaration complained of breaking and opening divers doors of plaintiff's dwelling-house, and breaking to pieces their locks, &c., and the plaintiff then new assigned that he brought his action for defendant's breaking the outer door of the house; and then new assigned again that he brought his action for defendant's breaking, &c., the locks, &c., belonging to the outer door, and wherewith it was fastened: Held, that the second new assignment was not bad, inasmuch as, under the complaint of breaking the outer door, plaintiff might give evidence of breaking the locks, &c.; and that the second new assignment, and the plea to it, raised the question, whether the sheriff, under the circumstances in the plea, might break open the outer door, as if the declaration had been merely for breaking the lock, &c., of the outer door.

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Plea 1. As to coming with force and arms, &c., and whatever else is against the peace &c., and as to seizing, taking, carrying away, and converting &c. (a part of the goods). Not Guilty.

Plea 2. As to the residue, that heretofore, and before any of the said times when &c., *Robert Jones* sued out in the Court of Exchequer a writ of fi. fa., directed to the sheriff of *Montgomeryshire*, to levy of the goods and chattels of plaintiff 55*l.* 1*s.* 4*d.*, indorsed to levy the whole and 7*s.* for costs, &c., which was delivered to defendant, being then, and thence until and at and after the times when &c., sheriff of *Montgomeryshire*, to be executed; by virtue of which writ, afterwards, and before the return of the said writ, to wit at the said time when &c. in the declaration first mentioned, defendant then lawfully being in a certain room in and parcel of the said dwelling house in which &c., and which said room then was occupied by one *Elizabeth Davies* as tenant thereof to the plaintiff, defendant, so being such sheriff as aforesaid, peaceably and quietly entered into the residue of the said dwelling house in which &c., through the door communicating between the said room so occupied by the said *Elizabeth Davies* and the residue of the said dwelling house in which &c., the same being then open, in order to seize and take in execution the said goods and chattels of plaintiff in the introductory part of this plea referred to, the same then being in the said dwelling house in which &c., for the purpose of levying the said monies so directed to be levied by the said writ and the said indorsement so made thereon as aforesaid, and did, at the said times when &c., seize and take in execution the said last mentioned goods and chattels, and, by sale thereof, levy a certain
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sum of money, to wit &c., part and parcel of the damages &c., and, in so doing, and because certain doors of and belonging to the said dwelling house in which &c., at the said time when &c., were shut, locked, and fastened with the said locks, bolts, staples, and hinges in the said declaration mentioned, so that defendant, so being in the said dwelling house in which &c., could not seize, take, and carry away the goods and chattels aforesaid, to levy the monies aforesaid, or execute the said writ, without forcing and breaking open the said doors, defendant, while he so continued in the said house as aforesaid, at the said time when &c., and for the purpose aforesaid, did force and break open the said doors, and, in so doing, did necessarily a little break and damage the same, and also a little break to pieces, damage, and spoil the said locks, bolts, staples and hinges of and belonging to the said doors respectively, doing no unnecessary damage to the plaintiff in that behalf; and also, in the said execution of the said writ, defendant, so being such sheriff, did necessarily and unavoidably make a little noise, &c., and stay, &c., for the space of time in the declaration mentioned, as he lawfully &c., which are the said &c.

The plaintiff joined issue on the first plea; and, as to the second, replied that he brought his action, not for the trespasses in the second plea mentioned and attempted to be justified, but for that defendant, on the said several days and times &c., with force and arms, &c., broke and entered the *outer* door of the said dwelling house in the declaration mentioned, and also broke and entered the said dwelling house, and made the said noise, &c., therein in the declaration mentioned, and stayed and continued &c., making the said noise, &c.,

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on other and different occasions, and at other and different times, and in other and different parts of the said dwelling house in the declaration mentioned than in the second plea mentioned, and therein attempted to be justified, in manner and form as the said plaintiff hath above thereof in his declaration in that behalf complained against defendant; which said several trespasses above newly assigned are other and different trespasses &c. Verification.

Plea to the new assignment. As to all except breaking the outer door of the said dwelling house, in which &c., and entering the same, as in the new assignment &c., Not Guilty. As to breaking the outer door &c., and entering, &c. as in the new assignment is alleged, &c., that, the said fieri facias having so issued, and having been so delivered to defendant, so being sheriff &c., and defendant having peaceably and quietly entered into the said dwelling house in which &c., to seize and take in execution the goods and chattels of plaintiff in the second plea mentioned, in the manner and for the purpose therein also mentioned, defendant, at the said times when &c., did seize and take in execution the said goods and chattels as in that plea is alleged, under and by virtue of the said writ; and, because the outer door of and belonging to the said dwelling house in which &c., at the said time when &c. in the said new assignment mentioned, was shut and fastened, so that defendant, so being in the said dwelling house &c. as aforesaid, and having so seized &c. as aforesaid, could not take and carry away the goods and chattels aforesaid in order to levy the monies directed to be levied by the said writ and indorsement, or execute the said writ, without opening the said outer door, and because neither plain-
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tiff nor any other person on his behalf was in the said dwelling house at the same time when &c., so that defendant could request plaintiff or such other person to open the said outer door, defendant, so being in the said house at the said time when &c., for the purpose last aforesaid, did open the said outer door, and, in so doing, did necessarily and unavoidably a little break the same, doing no unnecessary damage &c.; and defendant did then take and carry away the said goods and chattels for the purpose aforesaid, and in order to levy &c.; and, in so doing, defendant did necessarily and unavoidably go out of and re-enter the said dwelling house by the outer door thereof, the said outer door being open at the time of such re-entry, in order to take and carry away the said goods and chattels for the purpose aforesaid, and as he lawfully &c., which are the same supposed trespasses &c.

The plaintiff joined issue on the traverse; and, as to the second plea to the new assignment, new assigned again, that he brought his action, not for the trespasses in the introductory part of the second plea to the said new assignment mentioned &c., but for that defendant, on the several days and times in the declaration and in the said new assignment in that behalf mentioned, with force and arms, &c., broke to pieces, damaged, and spoiled the locks, bolts, staples, and hinges in the declaration mentioned, which said locks, bolts, staples and hinges were appertaining, belonging, and fixed to the said outer door of the said dwelling house in the declaration and in the said new assignment mentioned, and wherewith the same was fastened, in manner and form as plaintiff hath above thereof in his declaration &c. complained, which said several trespasses lastly new assigned

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are other and different trespasses than the said trespasses in the said second plea to the said new assignment mentioned, &c.

To this second new assignment, the defendant pleaded, first, Not Guilty; secondly, as to breaking &c., one lock, one bolt, and one staple, parcel of the locks, bolts, and staples in the said last new assignment mentioned, and as is therein alleged, that, the said *feri facias* having so issued, and been so delivered to defendant, being sheriff, as in the said second plea is mentioned, and defendant having peaceably and quietly entered into the said dwelling house in which &c., to seize and take in execution the goods and chattels of plaintiff in the second plea mentioned, in the manner and for the purpose therein also mentioned, defendant, at the said times when &c., did seize the said goods and chattels, as in that plea is alleged, under and by virtue of the said writ; and, because the outer door of and belonging to the said dwelling house in which &c., at the said time when &c., in the last new assignment mentioned, was shut and fastened with the said one lock, one bolt, and one staple, in the introductory part of this plea mentioned, so that defendant, so being in the said dwelling house in which &c., and having so seized &c. the said goods and chattels as aforesaid, could not take and carry away the said goods and chattels in order to levy or execute the said writ, without opening the said outer door, nor could defendant, upon that occasion open the said outer door so being fastened as aforesaid, for the purpose last aforesaid, without a little breaking, &c., the said last mentioned lock, bolt, and staple, and because neither plaintiff nor any other person on his behalf was in the said dwelling house at the said time

time when &c. so that defendant could request plaintiff or such other person to open the said outer door, defendant, so being in the said house as aforesaid, at the said time when &c., and for the purpose last aforesaid, did open the said outer door, and, in so doing, did necessarily and unavoidably a little break, &c., the said last mentioned lock, bolt, and staple, then appertaining and belonging to the said outer door, and wherewith the same was so fastened as aforesaid, doing no unnecessary damage &c., and as he lawfully, &c., which are the said supposed trespasses &c., and whereof plaintiff hath above by his said last new assignment complained &c.

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The plaintiff joined issue on the traverse; and, as to the rest of the plea, demurred, assigning for cause that defendant acknowledged the breaking to pieces, &c., one lock, one bolt, and one staple, appertaining, belonging, and fixed to the outer door of the dwelling house of plaintiff, and wherewith the same was fastened, as in the declaration and in the second new assignment alleged, and attempted to justify the same breaking, &c., under the execution of a writ of fieri facias directed to the sheriff, &c. Joinder in demurrer.

The case was now argued (a).

Jervis for the plaintiff. The defendant does not allege that he got into the house by the outer door then being open, nor that plaintiff shut the outer door, which would have justified the trespass, according to *White v. Whitshire* (b). The sheriff cannot break the outer door of a dwelling house, to execute a fi. fa.

(a) Before Lord Denman C. J., Littledale, Williams, and Coleridge Js.

(b) *Palm*. 52. S. C. 2 Ro. Rep. 137. Cro. Jac. 555.

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against the possessor; *Year-book, Pasch.* 18 E. 4. 4 A. pl. 19. (a); which case is cited and approved in *Lee v. Gansel* (b). *Semayne's Case* (c) is to the same effect. That case is given in *Smith's Leading Cases* (d), where the authorities are collected in the note. In *Buckenham v. Francis* (e) a plea in trespass for breaking and entering plaintiff's dwelling house justified under a *fi. fa.* against the plaintiff, but omitted to state that the outer door was open; and it was held bad for that reason. [Lord Denman C. J. There the declaration charged an entry.] Here the plea relies upon the defendant being in; he is as much bound to shew that he was in justifiably as that he entered justifiably. [Lord Denman C. J. Suppose he happens to be in the house when the writ is delivered to him.] The plea does not shew that he was in otherwise than by entering to execute the writ. Besides, if the sheriff chose to take furniture which was too large to be got out by the outer door, he could not break the door down to get it out. Here, too, it does not appear that this was the only door by which the furniture could be got out; other doors might be open. In *Lloyd v. Sandilands* (g), *Hutchinson v. Birch* (h), and *Ratcliffe v. Burton* (i), the distinction in *Lee v. Gansel* (b), between outer and inner doors, was adhered to; and in *Penton v. Browne* (k) a distinction was recognised between a dwelling house and other buildings. The whole law is laid down in *Foster's Reports*, &c. p. 319., *Second discourse (of Homicide)*,

(a) Cited in *Bro. Abr. Execution*, pl. 100. *Trespas.* pl. 290.

(b) 1 *Cowp.* 1.

(c) 5 *Rep.* 91 a.

(d) 1 *Smith's Leading Cases*, 39.

(e) 11 *B. Moore*, 40.

(g) 8 *Taunt.* 250.

(h) 4 *Taunt.* 619.

(i) 3 *B.* § P. 223.

(k) 1 *Sid.* 186.

c. 8. s. 19. &c. (a). From 1 *Rol. Abr.* 671. *Distress*, (M) pl. 2, 7, it appears that a distress may be taken *through* doors and windows; this being put, it seems, as a qualification of the rule that the outer door shall not be broken. Breaking out, which is the trespass confessed here, is subject to the same rules as breaking in, as in burglary.

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Welsby, *contra*. The passage in *Foster* relates only to the violation of the security of a dwelling house by an officer entering: it has no reference to the conduct which an officer, when he is once in the house, ought to pursue. Here, at all events, no illegal entry appears; for the defendant might have the leave of the lodger. It is said that there might be other outer doors; but the language of the plea is "the outer door," and it is alleged that the defendant could not take the goods away without opening it. *Buckenham v. Francis* (b) is inapplicable: there is no breaking in admitted upon the record now before the Court; but, on the contrary, the fact of the defendant being in the dwelling house is accounted for. Then, as to his subsequent conduct, the privilege as to the outer door has always been considered one which was to be strictly construed and not extended, *Lee v. Gansel* (c); it was allowed only because it was supposed to produce a less evil than would have resulted from the want of it. Now the defendant could not be bound to stay in the house until the plaintiff chose to open the door; the protection of the dwelling house cannot extend to the depri-

(a) Ed. 3.

(b) 11 *B. Moore* 40.(c) 1 *Cowp.* 6.

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vation of personal liberty. Neither was he bound to commit a trespass by going through the lodger's rooms. *White v. Whitshire* (a) is conclusive, if it appear, from this record, that the plaintiff, or any one for him, fastened the outer door; and that is the most natural interpretation of the record, the house belonging to the plaintiff, and the defendant clearly not having fastened the door. Burglary in breaking out is only by statute. The plea to the second new assignment clearly raises the same point as that to the first, the one relating to the outer door, the other to the lock, bolt, and staple, which are part of the outer door.

Jervis in reply. In *White v. Whitshire* (a) it was expressly alleged that the plaintiff fastened the outer door: here is no such allegation. It is said that the defendant was not bound to remain in the house; but he had no right to liberate himself by committing a trespass in the rooms of the lodger, or upon the plaintiff's outer door. Even if a writ were brought to a sheriff in a house, it does not follow that he could force his way out. At least the plea should have alleged that the outer door was fastened without the defendant's authority. Suppose, to preserve the goods, the defendant had himself locked the outer door while he was inside with the goods, and had sent the key away, would he be entitled to break open the outer door? Yet that is consistent with this plea. [*Coleridge J.* As to the analogy of burglary, a mere opening a latch is a burglarious breaking.] From the

(a) *Palm.* 52. *S. C.* 2 *Ro. Rep.* 137. *Cro. Jac.* 555.

language

language of the Court in *Lee v. Gansel* (a) it rather seems that it would be also a trespass within the rule now in question. [*Littledale J.* referred to *Com. Dig. Execution* (C 5.). *Welsby* cited *Dalton's Office and Authority of Sheriffs*, c. 94. (b).]

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Cur. adv. vult.

LORD DENMAN C. J., in this term (*January 31st*), delivered the judgment of the Court. After going through the pleadings his lordship said :—

Upon this state of the pleading, it appears that the defendant, in his plea to the declaration, has justified breaking and entering the house, and seizing the goods, under a writ of fieri facias. He does not allege in the plea that the outer door was open, which is generally necessary ; but he says that he was lawfully in a part of the house in the occupation of a lodger ; and, if the communication between the part of the house occupied by the lodger and the rest of the house should be in the nature of an outer door for the protection of the plaintiff's house, there is an averment in the plea that the communication between the two was open, and therefore the entry into the part occupied by the plaintiff was authorised. The plaintiff, in answer to this, says the matters justified in the plea are not what he complains of ; but he says he brought his action, not for that, but for breaking the outer door, and entering the house on other occasions, and at other times, and in different parts of the house. The defendant's answer to this new assignment is what has been already stated ;

(a) 1 *Coup.* 1.

(b) See in p. 350. (ed. 1700), the reference to *M.* 36 *Etiz.*

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that, in order to take the goods out of the house, it was necessary to open the outer door; and, as neither the plaintiff nor any body on his behalf was there, so as a request could be made to them, he opened it. The plaintiff, in answer, says, by another new assignment, that he did not bring his action for that, but for breaking the locks, bolts, staples, and hinges of the outer door.

It is to be observed that, in the first new assignment, the plaintiff says nothing about the locks, bolts, staples, and hinges; and, as the plaintiff has in that new assignment confined his complaint to breaking the outer door, and breaking and entering the house, he cannot carry his second new assignment beyond the first new assignment. A question may at first appear to arise, whether this second new assignment is not bad altogether: but we think not, because, under the complaint of breaking the outer door, the plaintiff might give evidence of breaking the locks, &c., fixed to and part of the door.

Then the defendant, in answer to this, pleads as before stated: so that the general question, whether a sheriff who has seized goods under a fieri facias has a right to break an outer door to take them out of the house, when there is nobody of whom to request that the door may be opened, would not appear to arise; for the plaintiff, by his second new assignment, abandons that complaint: and the only question on this record would now appear to be, whether he has a right to break the lock, bolt, and staple of the outer door to take out the goods. But, though the plaintiff has abandoned the general complaint of breaking the outer door of the house, yet, under the objection he makes as to breaking the lock, bolt and staple, he may contend that the sheriff had no right

right to break the outer door; and, though he has abandoned the general breaking open the door, he has not admitted, in the pleadings, as he might have been held to do if he had pleaded over in answer to the defendant's pleading: but here his pleading over is that the defendant has not given any answer to what the plaintiff means to complain of, and that he has mistaken the nature of the plaintiff's complaint, and that it ought to be considered in the same light as if there was a *nolle prosequi* as to the whole of the trespasses except breaking the lock, bolt, and staple of the outer door; and, as to that, we think that he may stand in the same situation as if his declaration had been originally confined to the mere act of breaking the lock, bolt, and staple of an outer door of the house.

It appears to us that, on the allegations on this record which are not denied, the sheriff had a right to break open the outer door, and to break the lock, bolt, and staple affixed to it. The sheriff shews a lawful entry into the house, and a lawful seizure of the goods; and, in his plea to the first new assignment, he says that he could not take the goods out of the house without opening the outer door; the particular door therefore is identified, so that it cannot be said there were any other doors, or any other mode of getting the goods out. Then what was the sheriff to do? The goods could not be kept for ever in the house; and neither the plaintiff, nor any body else, was there so that he could request them to open the door, and there was nothing else to be done but to open it himself; and he says that he did no unnecessary damage; and then, as to the complaint of breaking the lock, bolt, and staple, that he could not open the outer door without breaking,

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damaging, and spoiling them; and as to that also he alleges the absence of the plaintiff and every other person to whom he could make a request; and therefore, as to that also, which is now the only cause of complaint, he appears to be justified as a matter of necessity in order to get the goods out to execute the writ. It may be said that he locked the door himself; and, if so, he could not justify the breaking the lock, &c., to pieces. If he had done so, it might be further new assigned, or replied in some way or other; but, in pleading a justification, we do not think it necessary to aver that the trespass complained of was not occasioned by his own default. The case of *White v. Whitshire* (a) was trespass for breaking and entering plaintiff's house: justification under a fieri facias; and that, after entry to take the goods in execution, the plaintiff shut the door upon the bailiffs, and imprisoned them; then the defendant broke open the doors, and broke the locks to rescue the bailiffs. The Court said that, though the sheriff cannot break open a house to make execution by a fieri facias, yet, when the door is open, and he enters and is disturbed in his execution by the parties who are within the house, he may break into the house and rescue his bailiffs, and so take execution. In that case, the breaking into the house was justified, because the plaintiff himself had occasioned the necessity of it: but it does not follow that there may not be other occasions where the outer door may be broken.

Several cases were cited, as to the duties and powers of sheriffs; but they do not so nearly apply to the point raised on this record as to make it necessary to com-

(a) *Palm. 52. S. C. 2 Ro. Rep. 157. Cro. Jac. 555.*

ment upon them. Some of them seem to require that a demand should be made by the sheriff in particular cases; but the necessity of a demand in the present case is obviated, because there was nobody on whom a demand could be made.

Upon the whole of the case, we are of opinion that there should be judgment for the defendant.

Judgment for defendant.

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WEBB against BAKER.

*Friday,
January 19th.*

ASSUMPSIT. The declaration stated that defendant, "on the 13th day of *April* A.D. 1836, was indebted to the plaintiff in 50*l.* for goods sold and delivered by the plaintiff to the defendant, and at his request; and in 50*l.* for money found to be due from the defendant to the plaintiff on an account therein stated between them; and the defendant afterwards, on the day and year aforesaid, in consideration" &c., promised &c. Demurrer, assigning for causes, that no time is mentioned in the declaration when the goods were sold and delivered, nor when the account was stated. Joinder.

If a declaration contains a good and a bad count, and the whole is demurred to, the plaintiff is entitled to judgment generally, and the defendant will be put to his writ of error as to the bad count.

A count in assumpsit stating that defendant, on &c., was indebted to plaintiff for goods sold and delivered (without saying when) is not bad under the new rules of pleading.

Semble, by Lord Denman C. J., that a count in assumpsit, charging that defendant, on &c., was indebted to plaintiff on an account stated (without saying when), is good on special demurrer.

Humfrey for the defendant. It must be admitted that, according to *Lane v. Thelwell* (a), the statement as to time in the count for goods sold and delivered is sufficient: but the time of stating the account ought to have been more specifically pointed out; *Ferguson v. Mitchell* (b). The plaintiff, however, is not entitled to

defendant, on &c., was indebted to plaintiff on an account stated (without saying when), is good on special demurrer.

(a) 1 M. & W. 140. S. C. *Tyrwh.* & Gr. 352.

(b) 2 Cro. M. & R. 687. S. C. *Tyrwh.* & Gr. 179.

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judgment on the whole declaration, but on the good count only: note (9) to *Duppa v. Mayo* (a), *Com. Dig. Pleader* (Q. 3). [Coleridge J. The reference there is to *Duppa v. Mayo* (b), where the law on this point is laid down only in the argument of counsel. But Serjt. Williams's note cites another authority, *Bressey v. Humphreys* (c).]

Shee contra. The Court of Exchequer has decided that, where the whole declaration is demurred to, if one count be good, the demurrer is too large, and the plaintiff is entitled to judgment on the whole record: *Ferguson v. Mitchell* (d), *Spyer v. Thelwell* (e). *Powdick v. Lyon* (g) is to a similar effect.

LORD DENMAN C. J. On the authority of the cases in the Court of Exchequer, and for the reasons there given, I think our judgment must be against this demurrer, as being too large. The defendant may try his objection to the second count by writ of error, unless the plaintiff enters a nolle prosequi; but I myself cannot see why this count is bad (h). The judgment must be for the plaintiff.

LITLEDALE, WILLIAMS, and COLERIDGE Js. concurred.

Judgment for the plaintiff.

(a) 1 *Wms. Saund.* 285 b. See *Pinkney v. Inhabitants de Rotal*, 2 *Wms. Saund.* 379. |

(b) 1 *Saund.* 286.

(c) *Cro. Jac.* 557.

(d) 2 *Cro. M. & R.* 687. *S. C. Tyrwh. & Gr.* 179.

(e) 2 *Cro. M. & R.* 692. *S. C. Tyrwh. & Gr.* 191.

(g) 11 *East*, 565.

(h) A count upon an account "before then stated" was held good, in the Exchequer, in *Leaf v. Lees*, 7 *Dowl. P. C.* 189. (*Hil. T. 2 Vict.*) See also, in *K. B.*, *Binley v. Durham, Mich. T. (Nov. 13.) 1838*, where a similar count was held good.

1838.

FRANCES MARY BANKS *against* ANGELL and RAWLINGS.

Friday,
January 19th.

REPLEVIN. The declaration stated that the defendants heretofore, to wit on &c., "at the parish of *Lambeth*, in the county of *Surrey*, in a certain close there, took the goods and chattels, to wit part of a rick of hay, of her the said plaintiff, of great value, to wit of the value of 50*l.*, and unjustly detained" &c.

Avowry and cognisance, stating that the defendant *William Angell* avows, and the defendant *William Ingram Rawlings* acknowledges, "the taking of the said goods and chattels in the said declaration mentioned, in the said close in which &c., and justly &c., because they say that a certain person or persons, to the defendants unknown, for a long time, to wit for the space of one year next before and ending on the 29th of *September*, A. D. 1833, and from thence until and at the said time when &c., held and enjoyed the said close in which &c., with the appurtenances, as tenant or tenants thereof to the said defendant *W. Angell*, under and by virtue of a certain demise of the said close in which &c., together with other premises, theretofore made by one *John Angell* to one *William Wescombe*, for a certain term of years, which was not then and is not yet expired, at a certain yearly rent, to wit the yearly rent of 100*l.*, payable by equal half yearly payments,

the goods taken, or of the locus in quo, is cured by the defendant's avowing or making cognisance: and it makes no difference that the plaintiff has demurred to the avowry or cognisance.

Quære, whether defendant in replevin may avow for rent due from a tenant described only as "a person unknown to the defendant?"

An avowry not shewing who was defendant's tenant of the locus in quo, nor that the place was in lands or tenements of which defendant was seised as within his fee or seignior, is not good under stat. 21 H. 8. c. 19. s. 2.

An avowry stating that *J. S.* held the locus in quo as tenant to defendant under a demise thereof by *A.* to *W.*, at a certain rent, for a term not expired, *J. S.* being assignee of all *W.*'s estate and interest, and that rent was in arrear from *J. S.*, is not good, by stat. 21 H. 8. c. 19. s. 2., or stat. 11 G. 2. c. 19. s. 22., or by the two conjointly.

In a declaration in replevin, an insufficient description of

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that is to say" on the feast days of the Annunciation and Saint *Michael*, "the said person or persons being a person or persons to whom all the estate, interest, and term of years of the said *W. Wescombe*, of and in the said close in which &c., had come, and in whom the same, during all the time aforesaid, was legally vested by assignment thereof before that time duly made; and because the sum of 100*l.* of the rent aforesaid, for the space of one year ending as aforesaid on the said 29th day of *September* A. D. 1833, and from thence until and at the said time when &c., was due and in arrear from the said last mentioned person or persons to the said defendant *W. Angell*, under and by virtue of the said demise, be the said defendant, *W. Angell*, in his own right well avows, and the said defendant, *W. I. Rawlings*, as bailiff of the said defendant *W. Angell*, well acknowledges, the taking of the said goods and chattels in the said declaration mentioned, in the said close in which &c., and justly &c., as for and in the name of a distress for the said rent, so due and in arrear to the said defendant, *W. Angell*, as aforesaid, and which still remains due and unpaid." And this &c. Verification. There was a similar avowry and cognisance for 20*l.*, being an apportionment out of the rent of 100*l.*, in respect of the close in which &c., for a year ending *September* 29th, 1832.

Demurrer, assigning for causes, as to the first avowry and cognisance, that the defendants have not therein stated what person or persons in particular, or whether one or more, held and enjoyed as therein mentioned such premises as therein mentioned, nor from what person or persons in particular, and whether from one or more, the rent therein mentioned was due, and the allegations in this behalf are too vague and indefinite, and no proper
 issue

issue can be taken thereon; and also that defendants have not stated with sufficient accuracy, &c. (the like objection as to the statement of tenancy in the close in which &c., and the rent due in respect of it), whereby plaintiff is prevented from taking or tendering any certain or proper issue or issues as to the tenancy and holding in that avowry and cognisance mentioned, or as to the particular person or persons from whom the rent was due and in arrear. That defendants have not stated the name or names of the person or persons supposed to have held and enjoyed the said close in which &c. That they have not stated what person or persons in particular was tenant or tenants of the premises whereon the said distress was made, as, according to the form of the statute in that case &c., they ought to have done. That the avowry and cognisance is not framed either according to the statute in such case &c., or at common law: and that it is not therein stated that *W. Angell* ever had the reversion expectant upon the determination of the said term of years in the avowry and cognisance mentioned. Similar grounds (*mutatis mutandis*) were alleged as to the second avowry and cognisance. Joinder in demurrer. In the margin of the paper-book, the following objections were stated in addition. That no title to the reversion is deduced to *W. Angell* in either of the avowries or cognisances; nor is it alleged in either that he was ever possessed of the rents therein mentioned by the hands of any tenant; nor is it therein alleged that the premises therein mentioned were within any fee or seigniorship of the said *W. Angell*, according to stat. 21 H. 8. c. 19. s. 2. (a).

Channell,

(a) Stat. 21 H. 8. c. 19. sects. 1, 2, are as follows.

Sect. 1. "Where as well the noblemen of this realm, as divers other persons,

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Channell, for the plaintiff. The form of avowry and cognisance in this case is novel, and is not good at common law. It must be supported by stat. 21 H. 3. c. 19. s. 2., or stat. 11 G. 2. c. 19. s. 22., or both. The first-mentioned statute does not apply to ordinary cases between landlord and tenant, but is confined to manorial rents, customs, and services. At all events it is limited to cases in which the tenant would have an estate in fee, and where the lord could say that the lands or tenements were holden as "lands or tenements within his fee or seigniority." This construction of the statute is supported by *Bucknall's Case* (a), *Littleton*, s. 454., *Co. Litt.* 268 a. (b), 268 b. (c), *Littleton*, s. 457., *Co. Litt.*

persons, by fines, recoveries, grants, and secret feoffments, and leases made by their tenants to persons unknown, of the lands and tenements holden of them, have been put from the knowledge of their tenants, upon whom they should by order of the law make their avowries for their rents, customs, and services, to their great losses and hindrances :

Sect. 2. "Be it therefore enacted," &c., "That wheresoever any manner lands, tenements, and other hereditaments be holden of any manner person or persons, by rents, customs, or services, that if the lord, of whom any such manner lands, tenements, or hereditaments be so holden, distrain upon the same manors, lands, or tenements, for any such rents, customs, or services, and replevin thereof be sued, that the lord of whom the same lands, tenements, or hereditaments be so holden, may avow, or his bailiff or servant make cognisance, or justify, for taking of the said distresses upon the same lands, tenements, or hereditaments so holden, as in lands or tenements within his fee or seigniority, alleging in the said avowry, cognisance and justification, the same manors, lands, and tenements to be holden of him, without naming of any person certain to be tenant of the same, and without making any avowry, justification, or cognisance upon any person certain; and likewise the lord, bailiff, or servant to make avowry, justification, or cognisance in like manner and form upon every writ sued of second deliverance."

(a) 9 Rep. 36 a. He cited the passage beginning "*Nota reader.*"

(b) "But if the lord" to "beasts be taken."

(c) "And when *Littleton* wrote," to the end of the paragraph.

269 a, b. (a); *Gilbert's Law of Replevins*, p. 153, &c. (b). In *Com. Dig. Pleader* (3 K 15.), it is said that, in case of avowry for services, the defendant "must allege seisin of the services, where the commencement of them does not appear by deed," "and he must allege seisin by the hands of some certain person;" "and this since the *st. 21 H. 8. 19.* which enables an avowry for lands subject to rent, as well as before." It is also said there, that, "if he alleges tenure by homage, he must entitle himself to it;" "but since the *st. 21 H. 8. 19.*, he need not allege any certain tenant," and *Lucy v. Fisher* (c) is cited. But there the defendant, as bailiff of *Philip Audley*, had made cognisance, for that *George Lether* was seised in fee of the locus in quo, and held of *Philip* as of his manor, &c., by fealty, rent, and services, and for the said rent in arrear he made cognisance as bailiff of *Philip*, as in those lands held of him; and the objection was that, as the defendant had named *George Lether*, he ought to have avowed upon him by the common law, and not on the land by the statute; which objection was disallowed. That decision does not affect the present argument. Sect. 4 of stat. 21 H. 8. c. 19. gives plaintiffs the like pleas in all avowries and cognisances (pleas of disclaimer excepted) as they might have had before the making of that act. Now, before the statute, on avowry by the lord for rent and services, the plaintiff might have pleaded "out of his fee, generally:" *Com. Dig. Pleader* (3 K 16.). The present avowry and cognisance would not let in such a plea. It is not shewn that the defendant *W. Angell* was seised of a fee or seigniority in which the lands were, nor how he

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(a) "This to be understood" to "person in certain." (b) 4th ed.

(c) *Cro. Eliz.* 146. S. C. as *Lacy and Fisher's Case*, 1 *Leon.* 301.

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became entitled to the rent. The pleading alleges that a person unknown held as tenant to *W. Angell* by a demise from *John Angell* to *Wescombe*, but it does not supply the fact that *W. Angell* was reversioner.

Neither is this a good avowry and cognisance under stat. 11 G. 2. c. 19. s. 22. That section, after reciting that great difficulties often arise in making avowries, &c., enables all defendants in replevin to avow or make cognisance generally, first, that the plaintiff in replevin, or other tenant of the lands whereon the distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent then and still remains due; or, secondly, that the place where &c. was parcel of such certain tenements, held of such honor, lordship or manor, for which tenements the rent, relief, heriot, or other service distrained for, was at the time of such distress and still remains due; without further setting forth the grant, tenure, demise or title of such landlord &c. Under the first clause it was held, in *Sullivan v. Stradling* (a), that the landlord could not be called upon to shew his title by a plea in bar of nil habuit in tenementis; but there the avowry and cognisance alleged that one *Harris*, until and at the time when &c., enjoyed the land as tenant thereof under a demise made to him by the defendant; he, therefore, was the "other tenant" contemplated by the act. Here neither the plaintiff in replevin, nor any other specified person, is stated to have enjoyed the lands, but only "a certain person or persons to the defendants unknown." As to the second clause, it may be admitted that, if the avowry and cognisance were in other respects framed conform-

(a) 2 Wils. 208.

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ably to stat. 21 *H. 8. c. 19.*, this clause would dispense with any deduction of the lord's title, which, before stat. 11 *G. 2. c. 19.*, would have been necessary; but here it is not alleged that the lands are within the fee or seigniority of any person, so as to bring the case within the former statute.

It may be objected to the declaration, first, that the goods taken are not sufficiently described; but this would properly be a matter of special demurrer, and it is cured by pleading over; note (1) to *Taylor v. Wells* (a), *Bern v. Maittaire* (b), and *Kempston v. Nelson* (c) (overruling *More v. Clypsam* (d)): secondly, that the place is not shewn with sufficient certainty; but that objection likewise is cured by pleading over; *Bullythorpe v. Turner* (e).

Peacock, contra. The avowry and cognisance is good under stat. 21 *H. 8. c. 19.*, or at least under that and stat. 11 *G. 2. c. 19.* conjointly; or under the latter statute taken by itself. The present case is within the mischief recited in stat. 21 *H. 8. c. 19. s. 1.*, and the avowry and cognisance is within the privilege given by sect. 2, of alleging the lands to be holden of the lord, without naming any person certain to be tenant. *Lacy and Fisher's Case* (g) bears out the mode of pleading here adopted; the substance of that case (as stated in *Com. Dig. Pleader* 3 K 15.) being, that, if the lord "avows upon land, without avowing upon any person in certain, it is good by the statute, tho' he names a

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(a) 2 *Wms. Saund.* 74 a, b.

(b) *Ca. Temp. Hard. K. B.* 119. *S. C.* 2 *Stra.* 1015.

(c) 7 *Bac. Abr.* 90; *Replevin and Avowry*, (H). 7th ed.

(d) *Aleyn*, 32. *S. C. Style*, 71. (e) *Willcs*, 475.

(g) 1 *Leon*, 301. *S. C.*, as *Lucy v. Fisher*, *Cro. Eliz.* 146.

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certain person for tenant, &c. which the statute does not require." It is sufficient to shew in pleading that the land was holden of the avowant. The objection, that the defendant is not shewn to have been seised of a fee or seigniory, in which the lands were, might have been taken at common law ; but that averment is not necessary under the statute of *H. 8.*, which enables defendants in replevin to avow upon the land. The passage of *Co. Litt.* 268 b., which lays it down that, under the statute, seisin by the hands of some tenant must be alleged, applies only to cases where the origin of the rent does not appear by the avowry. [*Coleridge J.* How do you shew a holding under the defendant by virtue of the demise from *John Angell*? Nothing appears to connect the two. Lord *Denman* C. J. Stat. 11 G. 2. c. 19. s. 22. enables the defendant in replevin to avow, that the plaintiff held under a grant or demise, without further setting out the grant, tenure, demise, or title of the landlord ; but you shew a demise by a particular person, and that a different person from the defendant in replevin]. It is sufficient to allege that the plaintiff holds of the defendant ; the title may be deduced in evidence. [*Coleridge J.* You put the two statutes together, and leave out the tenant by one, and the landlord by the other]. The statute 11 G. 2. c. 19. was intended to remove difficulties not provided for by stat. 21 H. 8. c. 19. If the present form of pleading, as to the landlord, be not sufficient, a defendant in replevin is without remedy, supposing that the premises have at some time passed to an assignee who cannot now be discovered.

But, further, the avowry and cognisance is good by stat. 11 G. 2. c. 19., taken alone. By that statute,
 s. 22.,

s. 22., the defendant in replevin may avow (without setting out the grant, tenure, demise, or landlord's title) that the plaintiff in replevin, or other tenant of the lands &c., enjoyed the same under a grant or demise at a certain rent. But, although the plaintiff or other tenant is to be mentioned, under that clause, yet the law does not require that he should be named where it is impossible for the party pleading to specify the name. In such a case, the individual may be described as a person unknown; *Stephen on Pleading*, 331. c. II. s. 4. rule 4. 4th ed.: 2 *Hale's P. C.* 181. Part II. c. 25, s. 4. (ed. 1800.); *Partridge v. Strange* (a), *Buckley v. Thomas* (b), *Hartley v. Herring* (c), *Rex v. De Berenger* (d), *Young v. Murphy* (e). It is true that the party so pleading must prove that the person is really unknown; *Rex v. Walker* (g), *Rex v. Robinson* (h); but, if he choose to take upon himself that difficulty, no objection lies to the mode of description.

Lastly, the declaration is bad; because the place in which the goods were taken is not particularised; *Potten v. Bradley* (i). The demurrer there was special; but the objection would have prevailed on general demurrer. In *Ward v. Lavile* (k), after stat. 27 *Eliz. c. 5.*, the same defect was considered matter of substance; and stat. 4 *Ann. c. 16. s. 1.* only cures defects "of like nature" with those which are there specified; per Lord *Lyndhurst* C. B., in *Hooker v. Nye* (l). It is said that the objection is cured by pleading over; but that is only where the plea is allowed to

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(a) *Plowd.* 85.(c) 8 *T. R.* 130.(e) 3 *New Ca.* 54.(h) *Holt, N. P. C.* 595.(k) *Cro. Eliz.* 896.(l) 1 *Cro. M. & R.* 258. *S. C.* 4 *Tyrwh.* 777.(b) *Plowd.* 129.(d) 3 *M. & S.* 67.(g) 3 *Camp.* 264.(i) 2 *Mo. & P.* 78.

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be good; here the plaintiff demurs to the avowry and cognisance; and it cannot be at the same time demurrable, and good for the purpose of setting up the declaration. In *Bullythorpe v. Turner* (a) the plea which was held to cure the defect in the declaration was not objected to; the demurrer was to the replication. *Willes* C. J., in his judgment, points out that "the plea of the defendant is certainly good." [Lord *Denman* C. J. He does not give that as a reason for holding the declaration sufficient. The fact of pleading over is all that is requisite to set up the prior pleading. And *Willes* C. J. cites *Reade v. Hawke* (b), where a declaration in replevin was held bad, "because there was no place assigned where the taking was, but only a town;" but it is added, "some declarations in replevin are found without any other place, and avowries and other pleas made upon them without demurrer or exception to that point, and then they are good enough." *Littledale* J. In *Com. Dig., Pleader* (3 K 10.), it is said (citing *Weston v. Carter* (c), and *Hill v. Bunning* (d)), that "the omission of the place or *vill* will be aided, if the defendant does not demur for that." There is no rule in pleading that the mere fact of pleading over shall aid, if the plea does not stand as good on the record. [Lord *Denman* C. J. This seems to be a new distinction]. In *Bern v. Maittaire* (e) and *Kempston v. Nelson* (g) the objection to the declaration was taken after verdict; and, in all the instances where pleading over is said to aid, it will probably be found that there has been a verdict, or judg-

(a) *Willes*, 475.(b) *Hob.* 16. 5th edit.(c) 1 *Sid.* 9.(d) 1 *Sid.* 20.(e) *Ca. Temp. Hard. K. B.* 119. *S. C.* 2 *Str.* 1015.(g) 7 *Bac. Abr.* 90; *Replevin and Avowry*, (H). 7th ed.

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ment by default, or that the defect required to be pointed out by special demurrer, under the statutes of jeofails. Another objection to this declaration is the uncertainty in describing the goods; *Pope v. Tillman* (a), *Holmes v. Hodgson* (b); but it will be useless to urge this if the defect is cured by the avowry. [*Littledale J.* It is so, because the avowry and cognisance admits the taking of the things mentioned in the declaration].

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Channell, in reply. On the effect of the pleading over, no answer seems to be required. The description of a party as a "person unknown" may, in some instances, be correct; but here the person is described as unknown to the defendant only, not generally. [*Lord Denman* C. J. If he is unknown to the defendant, that is a reason why *he* cannot name him.] The common law obliged a defendant in replevin to name the tenant, in order that the party distrained upon might pray him in aid; the statute 21 H. 8. c. 19. s. 2. dispenses with naming a tenant, but requires the defendants to state that the lands or tenements are within the fee of the landlord, which averment the plaintiff may have the benefit of traversing if he thinks proper. If the mode of pleading here attempted were sufficient, the statutory enactment would have been unnecessary for the relief of landlords. It is expressly laid down in *Co. Litt.* 268 b., that, "albeit the purview of the act be general, yet all necessary incidents are to be supplied, and the scope and end of the act to be taken; and therefore, though he need not to make his avowry upon any person certain, yet he must allege seisin by

(a) 7 Taunt. 642.

(b) 8 B. Moore, 379.

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the hands of some tenant in certain, within forty years." Stat. 11 G. 2. c. 19. s. 22, relieves defendants from the necessity of setting out title, but not of stating the lands to be within the fee or seigniori, where that is required by stat. 21 H. 8. c. 19.

LORD DENMAN C. J. I am of opinion that this avowry and cognisance cannot be sustained. It is not within stat. 21 H. 8. c. 19., because that statute requires an averment that the lands are within the fee or seigniori of the avowant, which statement might be very important. Nor is it within stat. 11 G. 2. c. 19. s. 22., because it states merely that another person, not the avowant, demised to a tenant from whom the estate came by assignment to the person now in arrear. The statute relieves defendants from doing more than to state "a grant or demise at such a certain rent;" but, if the defendant alleges a demise by a particular person, and that not himself but another, it requires no learning or investigation to say that such an allegation cannot be sufficient. Whether or not it may properly be averred that a person unknown held and enjoyed the premises, it is unnecessary to say.

LITLEDALE J. The object of stat. 21 H. 8. c. 19. was to avoid the inconvenience arising from secret assignments, which prevented the landlord from knowing how he ought to avow. But the statute requires the landlord to avow taking "as in lands or tenements within his fee or seigniori." Perhaps it may sometimes be unnecessary to aver seisin, as in the case put in 1 Roll. Abr. 314. (*Avowry*) (A.), where it is said that "if a man makes a gift in tail, rendering rent, he may avow
without

without laying any seisin, because the reversion gives him a sufficient privity, and he shall count upon the reservation (a)." The privity shewn in such a case might be sufficient, without any allegation of seisin; but it is unnecessary to decide that point, because here no privity is shewn between *John Angell* and the defendant. The avowry and cognisance is therefore bad under stat. 21 H. 8. c. 19. And it is not sustainable under stat. 11 G. 2. c. 19. s. 22., for that requires the defendant in replevin to allege that the plaintiff or other tenant held under a grant or demise, or that the place was parcel of such tenements as there stated, which is not done here; and without this the plaintiff in replevin cannot know how to plead. Nor can the avowry and cognisance be good under the two statutes taken together; for, if that were so, a defendant in replevin might, in his pleading, leave out both tenant and landlord. Of two statutes dispensing with the requisites of the common law as these do, one or the other must be followed.

As to the declaration, it is sufficient after avowry. It might be a good cause of demurrer that the close in which the goods were taken is not specified. The defendants, however, take upon themselves to say what they justify for, and admit by their pleading that they know the close which is in question. So as to the goods; a plaintiff ought, properly, to specify them, by the hundred weight or otherwise; but the defendants here admit that some, at least, of the goods mentioned in the declaration have been taken. The cases as to declarations in the present form are in some instances contradictory; but it is too late now to raise the objection.

(a) 3 Vin. Abr. 371, *Avowry* (A).

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WILLIAMS J. The avowry and cognisance is not sufficient under either statute. The language of stat. 21 H. 8. c. 19. s. 2. is clear, independently of the authority of Lord *Coke*, for it enacts that the lord may avow, or his bailiff make cognisance, "alleging in the said avowry, cognisance and justification, the same manors, lands, and tenements to be holden of him, without naming of any person certain to be tenant of the same." Here the pleading contains nothing similar or equivalent to such an allegation. There is still less doubt on stat. 11 G. 2. c. 19. That statute, for removing the difficulties there adverted to, provides that the defendant shall not be obliged to state in detail the landlord's title; but he is still required to shew that the party distrained upon held of the party making the distress. Here the demise alleged is by one party; another makes the avowry, and no connection is shewn between them. The objection taken to the declaration is matter of special demurrer.

COLERIDGE J. The statute 21 H. 8. c. 19. was passed to meet the difficulty of knowing who the tenant was, in the cases mentioned in the preamble. It therefore dispensed with the naming of any person certain as tenant; but it left the necessity for shewing specifically the landlord's title, as at common law. Had this not been so, there would have been no necessity for the enactment in stat. 11 G. 2. c. 19. s. 22., which meets the very difficulty. The words used in the statute of H. 8., "without naming of any person certain to be tenant," apply only to the particular evil contemplated in the preamble, and do not dispense with the averment of seisin; and to this effect are the authorities cited in
Com.

Com. Dig. Pleader (3 K 15.). In *Paramor v. Chapman* (a) the defendant avowed under the statute "infra feodum et dominium," upon a stranger: the plaintiff pleaded "non tenuit" generally, without alleging tenure of any one, and traversed the tenure alleged: and this was held ill; and it was said that he might traverse the tenure or plead "hors de son fee," but could not plead non tenure generally at the common law. But this would not be so if the defendant could avow under the statute in the manner attempted here. Then, is the avowry and cognisance aided by stat. 11 G. 2. c. 19. s. 22.? The object of that clause (as explained in note (3) to *Poole v. Longueville* (b)) was to take away the necessity of stating a title in detail, and proving it, which often placed the landlord under difficulty; and it is therefore made sufficient, by this statute, to shew a subsisting tenancy by which the party avowed upon enjoys under the landlord. But the defendant here does not profess to ground himself on this statute, for he shews a title to which he himself is a stranger. No connection appears between him and *John Angell*. I agree that the defect in the declaration is cured by the defendant's having pleaded over.

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Judgment for the plaintiff.

(a) *Cro. Jac.* 127.

(b) 2 *Wms. Saund.* 284 c.

The QUEEN *against* The Inhabitants of St. *Saturday,*
JOHN THE EVANGELIST. *January 20th.*

This case is reported, 6 *A. & E.* 300. note (a).

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The QUEEN *against* The Inhabitants of
BARMSTON.

Father and son executed an indenture by which the son was bound apprentice to the father, as a tailor, for seven years, antedating the instrument by two years. The sessions found that this was fraudulently done, to evade the provisions of stat. 5 Eliz. c. 4., and obtain the benefit of a seven years' service by serving five.

Held, that the sessions were warranted in this conclusion, and that no settlement was gained by residence under such apprenticeship, although the parish insisting on the settlement was not party to the fraud.

ON appeal against an order of two justices, whereby *Jane Allman* was removed from the parish of *Bee-ford* to the parish of *Barmston*, both in the East Riding of *Yorkshire*, the sessions confirmed the order, subject to the opinion of this Court on the following case.

Gregory Allman, the pauper's late husband, was the son of *William Allman*, of the township of *Lissett*, in the East Riding. *Gregory Allman*, having gained a settlement in *Barmston* by hiring and service, went, in 1813, back to his father's house at *Lissett*; after which he, being still a minor, put himself apprentice by indenture to his father, to learn his trade of a tailor. The indenture was produced at the trial, and the execution proved. At the time of the execution, nothing passed with respect to the after-mentioned alterations. The indenture at first bore date 12th *December* 1813, and was for seven years; but afterwards, and before it was executed (but how long before did not appear), the parties, for the fraudulent purpose of enabling *G. A.* to exercise the trade of a tailor, and have the full benefit of the stat. 5 *Eliz. c. 4.* (then in force) in that respect, after a five years' apprenticeship, as fully as if he had served seven years as required by that statute, caused the date of the indenture to be altered; the year of the reign of *George III.* from the 53d to the 51st, and the year 1813 to 1811; and the figures 1811, in the body of the indenture, were written over a line which

which had previously occupied the space in which they were introduced. *Gregory Allman* served his father in *Lissett* under this indenture for five years. There was no evidence, at the trial of the appeal, to shew that the appellant parish was a party to the alteration of the indenture. From the circumstances above stated, the court of quarter sessions held the indenture to be fraudulent and void.

The question for the opinion of this Court was, whether *Gregory Allman* gained any settlement in *Lissett* by serving his father there under the circumstances above-mentioned. The case was now argued (*a*).

Alexander and *Archbold* in support of the order of sessions. This indenture was void, as an attempt to evade stat. 5 *Eliz. c. 4*. Sect. 26 permits householders, dwelling and exercising any mystery, &c., in corporate towns, to take apprentices for seven years at least: sect. 31 enacts that none shall exercise any craft or occupation unless he shall have been an apprentice therein seven years: and sect. 41 enacts that all indentures, made otherwise than as according to the statute, "shall be clearly void in the law to all intents and purposes." It is true that there is a class of cases in which the word *void* has been construed to mean *voidable*. *Rex v. St. Nicholas in Ipswich* (*b*) is the leading case on this point. But there no fraud was found, and indeed there could be none; and the question turned simply on the language of sect. 41. So in *Rex v. Evered* (*c*) and *Gray v. Cookson* (*d*) the indentures were

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(a) Before Lord Denman C. J., *Littledale, Williams, and Coleridge* Js.

(b) *Burr. S. C.* 91. *S. C.* 2 *Str.* 1066. *Ca. K. B. Temp. Hardw.* 323.

(c) *Cald.* 26.

(d) 16 *East*, 13.

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not fraudulent. But in *Rex v. Gravesend* (a) an indenture in terms directly prohibited by statute (10 G. 2 c. 31. s. 5.) was held void; and there the remark of Holt C. J., in *Bartlett v. Vinor* (b), was relied on, that "every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract, though the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender, because a penalty implies a prohibition, though there are no prohibitory words in the statute." That principle applies to contracts made with a fraudulent intent. In *Rex v. Hipswell* (c) an indenture was held void for being contrary to stat. 28 G. 3. c. 48. "for the better regulation of chimney-sweepers, and their apprentices," s. 4., Bayley J. refusing to construe "void" as merely "voidable," where the provision was "introduced for public purposes, and to protect those who are incapable of protecting themselves." The provisions of stat. 5 Eliz. c. 4. were clearly introduced for a public purpose, and to protect parties bound apprentices against the risks arising from their own inexperience. And it is observable that the penal clause, sect. 31, was not relied on in any of the cases in which the word "void," in sect. 41, has been construed as "voidable." An instrument executed with intent to evade the bankrupt laws would be void altogether. An indenture not mentioning the premium, nor stamped according to its value, was held absolutely void under stat. 8 Ann. c. 9. s. 39., in *Jackson v. Warwick* (d). In *Henfree v. Bromley* (e) an arbitrator, after his award was ready for delivery, altered

(a) 3 B. & Ad. 240.

(c) 8 B. & C. 466.

(e) 6 East, 309.

(b) Carth. 251.

(d) 7 T. R. 121.

it; and the Court held that it might be enforced as it stood before the alteration. There the alteration was simply nugatory: here the indenture was never executed except in furtherance of the fraud. It is true that there is no evidence that the appellant parish was a party to the fraud; but the same argument might have been used in favour of the settlement in *Rex v. Gravesend* (a) and *Rex v. Hipswell* (b). These two cases shew the unsoundness of the principle, which will be said to have been sanctioned in *Rex v. Tedford* (c), that fraud to which the parish relying on the settlement is not a party shall not defeat the settlement. It is true that, the sessions having not only found the fraud, but also stated the facts from which they infer it, this Court may discuss the question, whether the facts support the finding of fraud. As to that, however, there is clearly enough to support the finding, the object being manifestly to evade the statute. [Coleridge J. If the fraud were not effected the argument fails. Now could not the parties have held each other to the seven years?] The fraud, so far as concerns the intention of the parties executing, was complete. It is no answer to this to say that it was merely inchoate because it might have been or was defeated. If this be not a fraud, it would not be a fraud to antedate the indenture by seven years all but forty days.

R. C. Hildyard, contra. But for fraud, this deed would be good between the parties; the inaccuracy of the date being immaterial; *Com. Dig. Fait*, (B 3.). As, therefore, the deed might have been enforced, the find-

(a) 3 B. & Ad. 240.

(b) 3 B. & C. 466.

(c) *Bur. S. C.* 57.

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ing of the sessions cannot be supported. Even if the deed be good for five years only, the settlement is not defeated, the deed being merely voidable; *Rex v. St. Nicholas in Ipswich* (a). That case was determined upon consideration, and with the full knowledge that the decision contravened the literal interpretation of the statute. In *Rex v. Stoke Damerel* (b) *Holroyd J.* appeared to think that the same construction would have prevailed, had not the words in the statute then under consideration (stat. 56 G. 3. c. 139. s. 11.) been "no indenture" &c. "shall be valid *and effectual*." The tendency of the decisions has been to limit the restriction imposed by stat. 5 *Eliz. c. 4.*; 1 *Blackst. Com.* 428. *Rex v. St. Nicholas in Ipswich* (a) is confirmed by *Rex v. Evered* (c), *Gray v. Cookson* (d), and *Rex v. St. Petros* (e). The effect of *Rex v. Hipswell* (g) and *Rex v. Gravesend* (h) is merely that statutes expressly prohibiting particular bindings render instruments contrary to the enactment void: but here, as Lord *Tenterden* pointed out in *Rex v. Gravesend* (h), sect. 26 is merely permissive. In *Rex v. St. Gregory* (i) the authority of *Rex v. St. Nicholas in Ipswich* (a) was recognised. Further, it may be contended that stat. 54 G. 3. c. 96., by a retroactive effect, makes this indenture good for the purposes of settlement. Again, there is no fraud. *Rex v. Tedford* (k), *Rex v. Great Glenn* (l), and *Rex v. Kilby* (m), shew that this Court may examine whether the facts stated support

(a) *Bur. & C.* 91. *S. C.* 2 *Str.* 1066. *Ca. K. B. Temp. Hardw.* 323.

(b) 7 *B. & C.* 568.

(c) *Cald.* 26.

(d) 16 *East*, 13.

(e) 4 *T. R.* 196.

(g) 8 *B. & C.* 466.

(h) 3 *B. & Ad.* 240.

(i) 2 *A. & E.* 99.

(k) *Bur. S. C.* 57.

(l) 5 *B. & Ad.* 188.

(m) 2 *M. & S.* 501.

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the inference of fraud. And *Rex v. Tedford* (a) shews that no fraud can defeat the settlement, unless it be a fraud regarding the settlement, as by the parish which insists on the settlement being a party to the fraud; *Rex v. Great Sheepy* (b). [*Alexander*. That was a parish binding; and the parish officers, who were parties to the indenture, were not privy to the fraud.] It is contended that fraud vitiates ab initio; and the instance of an attempt to defeat the bankrupt laws is suggested. But, if an assignment were made for the purpose of a fraudulent preference, and in fact the creditors were paid all in full, the assignment would not be avoided. So, if a conveyance were made with a false date, to give a vote under stat. 2 & 3 W. 4. c. 45., yet, if by lapse of time the residence from the real date of the conveyance were perfected, the conveyance would not be avoided. So a conveyance executed with a false date to give such a vote might confer a settlement under stat. 9 G. 1. c. 7., if 30*l.* were paid and there were forty days' residence. Fraud defeats deeds only as to the object of the fraud. [Lord Denman C. J. *Grant v. Welchman* (c) appears in point; but that was decided on the authority of *Gray v. Cookson* (d). Here the father could not have enforced the son's fulfilment of the apprenticeship, being a party to a fraud, which distinguishes the case from *Gray v. Cookson* (d).] *Rex v. Harrington* (e) shews that the settlement is not affected by the indenture being executed on a day different from that of the date.

Cur. adv. vult.

(a) *Bur. S. C.* 57.

(c) 16 *East*, 207.

(e) 4 *A. & E.* 618.

(b) 8 *B. & C.* 74.

(d) 16 *East*, 13.

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Lord DENMAN C. J., in this term (*January 30th*), delivered the judgment of the Court. After stating the facts relating to the execution and alteration of the indenture, his Lordship proceeded as follows.

Under this indenture there was a sufficient service to gain a settlement. And if, as was contended, the result of this statement was that the pauper was bound for five years only, we should not have disturbed the rule of law laid down in *Rex v. St. Nicholas in Ipswich (a)*, and so many other decisions. We think, however, that the state of the case is very different. The sessions have found a fraudulent purpose, and the facts from which they arrived at that conclusion. And, although, as was contended by the learned counsel in support of the rule (and not denied on the other side), as the grounds of the finding are stated, this Court may examine into its correctness, yet it is equally certain that it will sustain the conclusion of the sessions where that can be reasonably done: and we think it may in the present instance.

When the near relation of the parties is considered, and, moreover, that there was a purpose of evading the statute, which certainly prohibits the carrying on a trade except by a person who has served an apprenticeship of seven years, under a penalty (*b*), we are of opinion that the sessions were well warranted in concluding that the indenture was, by the facts disclosed, avoided.

A doubt was suggested, upon the language attributed to Lord *Hardwicke* in the case of *Rex v. Tedford (c)*,

(a) *Burr. S. C.* 91. *S. C.* 2 *Str.* 1066. *Ca. K. B. Temp. Hardw.* 323.

(b) Sect. 31.

(c) 2 *Bott*, 757, pl. 986, 6th ed. *S. C. Burr. S. C.* 57.

whether

whether this was a species of fraud into which the sessions could inquire, as it respected the conduct of the parties themselves to the contract, and not of either of the contending parishes. When, however, the real character of a transaction, which may be apparently regular, is in question, we cannot see how the conduct of the parties, upon which the whole depends, can be withdrawn from consideration, and do not find that any such distinction as that above alluded to has been observed. And, accordingly, in the case of *Rex v. Gravesend* (a), where the indenture was regular upon the face of it, facts were proved in order to shew that an evasion of a statute prohibiting the master (a waterman) from taking more than two apprentices was intended, and the indenture was avoided thereby.

We think, therefore, that the sessions were warranted in drawing the conclusion of fraud; that the indenture was therefore void, and that their order should be confirmed.

Order of sessions confirmed.

(a) 3 B. & Ad. 240.

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1838.

Saturday,
January 20th.

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In a case of settlement submitted to this Court by the sessions, it appeared that the pauper, on hiring himself for a year, told the master (while making the bargain) that he should want a holiday to go to his feast, and the master agreed that he should have one for that purpose. The time and duration of absence were not specified.

When the feast was at hand, the pauper, on a Sunday, told his master that he wanted to go, and the master said he might go till Tuesday night, which the pauper did.

The case stated that the sessions thought a settlement was obtained, inasmuch as there was no distinct period named for the holiday, though it might be implied from the conversation that the pauper would expect, according to the contract, two or three days to go to his feast; and the sessions discharged an order removing the pauper to his birth-settlement, subject to the opinion of this Court on the above point.

Held, that the hiring was exceptive. Order of sessions quashed.

ON appeal against an order removing *Thomas Quincy* from the parish of *Threkingham* in the parts of *Kesteven*, in the county of *Lincoln*, to the parish of *Suttern*, in the parts of *Holland*, in the said county, the sessions quashed the order, subject to the opinion of this Court upon a special case. The facts stated, on which the decision ultimately turned, were as follows. The pauper was legally settled at *Suttern* by parentage. He stated, on the hearing of the appeal (a), "that he was hired at *May-day* 1828 till the following *May-day* by *William Moore* of *Pickworth*, in the said parts of *Kesteven*, farmer, at the wages of 5*l.*; that he told his master he should want a holiday to go to his feast, who agreed that he should have one for that purpose; that this conversation took place before the bargain was completed, and before he received his earnest; that no time was fixed as to the duration of the holiday, but, when the feast arrived, the pauper told his master on the *Sunday* that he wanted to go, and that his master replied, 'Very well, you may go until *Tuesday* night;'

(a) The case here stated an attempted proof of a settlement by hiring and service in *Falkingham*, but added, that the sessions held that contract to have been dissolved before the end of a year; and no question was submitted to this Court on the subject.

that

that the pauper accordingly went to his feast on the *Sunday*, and returned on the *Tuesday* night following." The Court of Quarter Sessions were of opinion that the settlement at *Pickworth* was good, inasmuch as there was no distinct period named for which the pauper was to have his holiday, although it might be implied from the conversation between the master and the pauper that the latter would expect, according to his contract (a holiday having been stipulated for), two or three days to go to his feast; and they quashed the order, subject to a case for the opinion of this Court upon the point in question.

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N. R. Clarke, in support of the order of sessions. This was not an exceptive hiring. The conversation on the subject of a holiday was too loose and general to constitute an agreement. The period of absence was not defined, but was left to be settled by the master when the time should come. The pauper stated that he should want a holiday, merely lest, when the demand should be made, the master might think it unreasonable: the time of the feast was not mentioned; and, when it came, the pauper asked leave, and the master fixed the period of absence. [Lord *Denman* C.J. The agreement must at least have contemplated time enough for going and returning; and at the period of feast, whenever that was.] A mere time for going and returning was not the object of the contract; something more indefinite was meant. [Coleridge J. Must not this have been a stipulation for a day's absence at least?] *Rex v. Leamington Priors (a)* may be cited on the other

(a) 8 Dowl. & R. 329.

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side; but in that case there was an express stipulation for two or three days. The sessions have found in favour of the yearly hiring, and this Court will not interfere with their decision if there be any premises to warrant it; *Rex v. Rosliston (a)*, *Rex v. St. Martin, Leicester (b)*.

Thesiger, contra, was stopped by the Court.

LORD DENMAN C. J. The sessions here have given us the very words employed by the parties; and it appears that the servant told his master he should want some time to go to his feast, and the master agreed he should have a holiday for that purpose. We must consider that to be an exceptive hiring.

LITLEDALE J. concurred.

WILLIAMS J. I am of the same opinion. The cases shew decisively that where there is a stipulation for time during the year the extent of it is not material.

COLERIDGE J. It is an exceptive hiring if any part of the year is excepted. The sessions appear to have taken a wrong view of the stipulation as to a holiday.

Order of sessions quashed.

(a) 8 B. & C. 668.

(b) 8 B. & C. 674.

1838.

BINNS, PISTELL, and GATLIFFE, Assignees of
HARRISON, an Insolvent Debtor, *against*
TOWSEY.

Tuesday,
January 21st.

ASSUMPSIT for money had and received to the use of the plaintiffs (not saying *as* assignees), and on an account stated. Plea, non assumpsit.

On the trial before Lord *Denman* C. J., at the *Middlesex* sittings after *Trinity* term, 1836, it appeared that the insolvent was arrested in *May* 1834, and was discharged under the Insolvent Debtors' Act in *December* 1835, having executed the assignment to the provisional assignee on 17th *June* 1835. The provisional assignee assigned to the plaintiffs in *January* 1836.

By indenture, dated 14th *November* 1834, between the insolvent of the first part, the two plaintiffs, *Binns* and *Pistell*, a person named *Hutton*, and the defendant, of the second part, and the bonâ fide creditors whose names and seals were thereunto subscribed of the third part, reciting that the insolvent had become involved in debt, and rendered liable to the payment of monies which he was unable to pay and discharge in full at present, and therefore, in order to render to them the utmost satisfaction in his power, he had proposed to assign all his real and personal estate whatsoever and wheresoever, debts, and effects, to any two or more of his creditors, in trust for themselves and the rest of the creditors rateably, reserving to himself any surplus, as under a commission of bankruptcy, and reserving to himself the annual dividends of 2096*l.* in the 3 per cent. reduced,

Under stat. 7 G. 4. c. 57. s. 32., an assignment of property by an insolvent, made after the commencement of his imprisonment, and before the assignment to the provisional assignee, for the benefit of all the creditors, in satisfaction of all debts owing to the creditors joining in the deed, without new consideration, or pressure, is fraudulent and void as against the assignee under the act; and he may bring an action for money had and received against the trustee under such deed, for any sum which the latter receives.

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reduced, standing in the name of trustees, and by them paid to him half yearly, upon condition of being released and discharged from his several debts in manner thereinafter provided, to which the parties of the second and third parts had agreed, and had chosen the parties of the second part to be trustees for the same accordingly; reciting, also, that the insolvent was entitled for his separate use, under his marriage settlement, to the interest or annual dividend on 3000*l.*, or thereabouts, in the 3 per cent. reduced, standing in the names of trustees, which the insolvent proposed to assign to the parties of the second part, to the uses and for the purposes thereafter declared; reciting, also, that the insolvent was interested in certain leasehold property therein described, which he also proposed to assign (as before); reciting also, that he was possessed of sundry plate, linen, books, and other effects, and had various debts due to him, all of which he had agreed to assign (as before), as also all his real and personal estates and effects whatsoever and wheresoever, except the annual dividends on the 2096*l.*: it was witnessed that, for and in satisfaction of all the debts and demands due to the creditors, parties thereto, of the second and third parts, and in consideration of 5*s.*, the insolvent bargained, sold, assigned, transferred, and set over the property mentioned in the recital (except the 2096*l.*), and all other the estate and effects of what nature or kind soever and wheresoever, habendum to the parties of the second part, their executors, administrators, and assigns, in trust to receive, sue, &c., and (after payment of expenses) to divide among themselves and other bonâ fide creditors, parties thereto of the third part, rateably. The insolvent then appointed the parties of the second part his attorneys

attorneys to demand, &c. (upon the trusts therein-before declared), and the said parties covenanted to divide, &c.: "in consideration whereof, and of this assignment, the respective creditors, parties hereto, of the second and third parts, do severally and respectively accept the hereinbefore assigned estate and effects, in full payment and satisfaction of all their respective debts and demands." The indenture was signed and sealed by the insolvent, several creditors, and the four parties of the second part, including the plaintiffs *Binns* and *Pistell*.

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In *November* 1835, after the assignment to the provisional assignee, and before the assignment by him to the present plaintiffs, the defendant, acting under the indenture, received 37*l.* 2*s.* on account of the dividends due in *October* 1835 on stock assigned to the trustees, and also 11*l.* on account of the dividends on the 2096*l.* stock reserved to the insolvent by the same indenture. The action was brought for the 48*l.* 2*s.* No evidence was given of the insolvent having executed the deed of 14th *November* 1834 under pressure from creditors.

On these facts, the Lord Chief Justice directed a verdict for the plaintiffs, giving leave to the defendant to move for a nonsuit, or reduction of damages. In *Michaelmas* term, 1836, *Blackburne* obtained a rule accordingly (a).

Cresswell and *Cleasby* now shewed cause. This deed is fraudulent and void as against the assignees, under stat.

(a) On moving, *Blackburne* contended that, as two of the plaintiffs had joined in the indenture of 14th *November* 1834, that indenture could not now be objected to by them as invalid. But this point was not insisted upon in the argument on shewing cause.

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7 G. 4. c. 57. s. 32. It was voluntary; and it was an assignment of property to creditors for the benefit of creditors. *Davies v. Acocks* (a) will be cited. There it was held that an assignment of effects by a debtor in a state of insolvency, for the benefit of all the creditors, was not fraudulent within the section. But there the debtor executed the deed under pressure from his creditors, of which there was no evidence here. It is true that Lord Abinger C. B. expressed an opinion that an assignment for the benefit of all creditors could not be a fraud under the statute, on the ground that it merely furthered the object of the statute, which was an equal distribution. But this was not necessary to the decision of the case; and *Alderson* B. declined to adopt the same view, pointing out the difference between a distribution under the management of the officer of the Court, and one managed by a trustee selected by the debtor. And the language of the section is general, "to any creditor or creditors," for the use, &c., "of any creditor or creditors:" there is nothing to confine the operation to cases where only a part of the creditors take the benefit, which seems to have been Lord Abinger's interpretation. The ordinary meaning of the words should be adhered to, as was said of this statute in the judgment of the Court of Exchequer in *Becke v. Smith* (b). And it would be dangerous to allow an insolvent to select his own trustee, and make his own terms, excluding such creditors as will not assent to the choice of that trustee, or to those terms, and all creditors who may not know of the assignment. The policy of the act is to vest every thing in the

(a) 2 C. M. & R. 461. S. C. 5 Tyrwh. 963. (b) 2 M. & W. 195.

assignee,

assignee, even goods of which the insolvent is only reputed owner; sect. 30. The act distributes among all the creditors without restriction; and many parts of its machinery (such, for instance, as respect the accounting by the assignee, ss. 35, 36, the distribution under s. 37, and the notice to creditors under s. 42, and the enactment as to omissions in the insolvent's schedule, s. 70) would be evaded: it cannot therefore be said that such a deed carries into effect the object of the act. In *Owen v. Body* (a), even independently of stat. 7 G. 4. c. 57., it was held a sufficient objection to an assignment that creditors could not take the benefit of it without becoming partners in trade. Section 32 declares all deeds like the present fraudulent and void, if made within three months before the commencement of the imprisonment, or with the intention of petitioning. [Coleridge J. This is not made either "within three months before the commencement of such imprisonment," or with the intention of taking the benefit of the act.] The section avoids deeds made as described in the early part: and then the proviso exempts from this enactment all deeds not made within three months before the imprisonment, or with the intent of petitioning. But the expression, "unless made within three months before the commencement of such imprisonment," does not exclude deeds made after the imprisonment: it prescribes only the period before which any deeds may be executed without being avoided, unless made with the intention of petitioning: this was pointed out in the judgment of the Court of Exchequer in *Becke v. Smith* (b). Another objection to the deed

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(a) 5 A. & E. 28.

(b) 2 M. & W. 198.

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is that it is not an assignment of all the property; a part is reserved to the insolvent. [*Coleridge J.* It was urged, in support of the rule, that the plaintiffs did not, in the declaration, claim in their representative capacity (a).] This money never was received to the use of the insolvent; it may therefore be described as received to the use of the plaintiffs in their individual characters. The objection, if it be one, is on the record.

Cottingham, contra. The verdict must certainly stand as to the 11*l.* received on the fund reserved to the insolvent: that would not be protected by the assignment. The question is, whether the assignment can be supported as to the rest. Now, independently of the statute, such an assignment is undoubtedly valid; *Holbird v. Anderson* (b), *Pickstock v. Lyster* (c). Then it is not fraudulent under the statute; for its object was, not to defeat, but to further, the objects of the statute. As to this, *Davies v. Acocks* (d) is an authority. The arguments urged against the assignment, in that case, are nearly the same with those used against the present rule. In the bankrupt act, 6 G. 4. c. 16., passed the year before this statute, sect. 4 expressly declares an assignment for the benefit of all the creditors (unless under the circumstances there pointed out) an act of bankruptcy; had the legislature intended in this act to avoid such a conveyance, the intention would have been expressed, as in the prior act.

(a) On this point, *Blackburne*, in moving, cited *Henshall v. Roberts*, 5 East, 150; and *Brigden v. Parkes*, 2 B. & P. 424.

(b) 5 T. R. 235.

(c) 3 M. & S. 371.

(d) 2 C. M. & R. 461. S. C. 5 Tyrwh. 963.

Lord

Lord DENMAN C. J. The question is, whether this deed be fraudulent under sect. 32 of stat. 7 G. 4. c. 57. The debtor here, after his imprisonment, being in insolvent circumstances, has voluntarily assigned effects to creditors, for the benefit of creditors: the assignment therefore falls within all the conditions of the enacting part of the section. We need not enquire how the law stood before the statute. By the proviso in the same section, no such assignment is to be deemed fraudulent and void, "unless made within three months before the commencement of such imprisonment," or with the intention of petitioning. Here it was not imputed that the assignment was made with the intention of petitioning: is it then within the exception of the proviso, as not being made within three months *before* the commencement of the imprisonment? I think not. If it were, the proviso would protect all deeds made subsequently to the imprisonment, unless made with the intention of petitioning; and that is inconsistent with the enacting part of the section. The proviso clearly refers only to deeds made before the imprisonment. The intention of procuring a discharge is, under the proviso, to invalidate the deed; that seems to point to a time antecedent to the arrest. And this is consistent with the decision of the Court of Exchequer in *Davies v. Acocks* (a). In that case it was attempted to shew that the assignment was voluntary, from the insolvent's motive, which therefore, if fraudulent at all, must have been so independently of the statute, or the argument would not have been supported; and the Court held that there was not such a motive as made the conveyance voluntary. Here the question relates to fraud

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(a) 2 C. M. & R. 461. S. C. 5 Tyrwh. 963.

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in the statutable sense, on the ground of the deed being voluntary. In *Arnell v. Bean* (a), to which my brother *Coleridge* has drawn our attention, there was a consideration for the assignment, which, as the Court held, prevented the assignment from being voluntary and fraudulent within the thirty-second section. Here the assignment appears, on the facts of the case, to be voluntary; and it is therefore fraudulent within the section.

LITLEDALE J. Without enquiring whether the reservation to the insolvent be sufficient to invalidate the deed, we are to consider whether an assignment be voluntary, where a party assigns all his property for the benefit of all his creditors. It seems to me that the assignment is voluntary, if it be made without consideration. That is one way in which the assignment may be voluntary. The debtor gives up all his effects to his creditors; and, not being able to pay them in full, he pays a part to each rateably; so that there is no new consideration. If there were a new consideration, I should say that the assignment was not of itself voluntary: but the absence of such a new consideration makes it voluntary. If the assignment were made under the pressure of creditors, that also would make it not voluntary. These two circumstances, pressure of creditors and new consideration, constitute the only cases which occur to me, in which the assignment would not be voluntary. Then, it being so, what are the provisions of sect. 32? The word "creditors" is not confined to the case where a part only of the creditors

(a) 8 Bing. 87.

are benefited, but extends also to an assignment for the benefit of all. Therefore, by the enacting part of the section, the deed is void. Then does the proviso restrict the effect of the enacting part to assignments executed within the three months before the commencement of the imprisonment, excluding those made after? If so, the assignment here, being made after the commencement of the imprisonment, would not satisfy the conditions of the clause; for it was not suggested that it was executed with the intention of petitioning. But my opinion is, that the proviso was intended to apply to such conveyances only as should be made before the commencement of the imprisonment, and to provide which of such conveyances should be within, and which should be excluded from, the enacting part of the clause. For that enacting part makes such conveyances void, whether made before or after the imprisonment. The result clearly is, that all such conveyances are avoided if made after the commencement of the imprisonment, and, also, if made within three months before such commencement, and, also, if made at any time with the intent of petitioning.

WILLIAMS J. Although one might have wished that the language of the section, including the proviso, were more significant than it is, I think there is no practical difficulty in the language. If indeed we interpret the proviso in its most obvious and direct sense, it will be inconsistent with the enacting part; for it will then protect all conveyances made after the imprisonment, which clearly was not intended. Next, I think that, on the grounds which have been stated, this was a voluntary conveyance. If that be so, I cannot agree that

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such a deed is equivalent to the statute, in intention or effect. If that were held, we should be allowing a private instrument to interfere with the operation of the Insolvent Debtors' Act.

COLERIDGE J. There are two questions here; first, whether the deed be within the enacting part of the section; and, secondly, whether, if so, it be within the protection of the proviso. Now, on looking at the words of sect. 32, it is perfectly clear that this conveyance satisfies every condition of the enacting part. It is said that the word "creditors" does not apply to cases where the assignment is for all the creditors. I cannot agree to that. In *Arnell v. Bean* (a) we find a definition of a voluntary conveyance. It is there said to be "either an assignment made without such valuable consideration as is sufficient to induce a party acting really and *bonâ fide* under the influence of such considerations, or an assignment made in favour of a particular creditor spontaneously, and without any pressure on his part to obtain it." Now this is the case of a party assigning, not indeed for a particular creditor, but for all, spontaneously, and without pressure or new consideration. It is not like the case of an assignment for the benefit of a creditor holding a security that over-rides the property assigned: which assignment has been held not voluntary. Such a deed as the present, if upheld, would prevent the distribution under the Insolvent Debtors' Act. Then, secondly, as to the proviso. It is not suggested that there was any intention of petitioning at the time of the assignment. Then does the case

(a) 8 Bing. 87.

fall within that part of the proviso which enacts that no such assignment shall be deemed fraudulent and void as against the assignee, unless made within three months before the commencement of such imprisonment? That, I think, is limited to the case of conveyances made before the imprisonment. If not, it would destroy the effect of the enacting part of the clause in all cases of deeds made after the imprisonment commenced; whereas the language of the enacting part clearly shews that it points to conveyances made after that period. And there are obvious reasons why, in the case of conveyances made before the imprisonment, the result should be made to depend upon the distance of time; but, after imprisonment, the legislature absolutely takes away from the party all control over his property which could have the effect, in case of a subsequent application to the Insolvent Debtors' Court (for it is to be remembered that it is upon this supposition that the clause applies), of interfering with the distribution under the act.

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Rule discharged.

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Tuesday,
January 21st.

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An inhabitant of the parish of *W.* was libelled for non-payment of rates imposed for the repair of the parish church, and of certain chapels built within the parish, under stats. 58 G. 3. c. 45., 59 G. 3. c. 134., and 3 G. 4. c. 72. He declared in prohibition, alleging that the rate was improperly laid on a part of the parish only, excluding the township of *H.* Plea, that the chapels were built in aid of the parish church; that there has immemorially been a chapel in *H.*, at which the inhabitants of *H.* have received all divine rites and ser-

vices; that the costs of repairing the chapel have been immemorially defrayed by the inhabitants of *H.* and no others; that from time, &c., no rate for repairing the parish church has been laid on any person in *H.*; and that the inhabitants of *H.* have from time, &c., been exempt from contributing to the repairs of the parish church. A verdict having been given for the defendants on a traverse upon this plea,

Held, on motion for judgment non obstante veredicto, that the Court must, after verdict, intend the chapel to have been coeval with the church (although that fact was not pleaded): And that, the chapel and church being coeval, and the inhabitants having always been exempt from the church-rate, no rate for repairing the church could now be imposed upon them.

Also that, under stat. 3 G. 4. c. 72. s. 20., which directs that chapels built under the two first-mentioned acts or that act shall be repaired by the parishes or places at large to which they belong, the new chapels mentioned in the above pleadings were repairable by the district which repaired the church; viz. the parish of *W.* minus the township of *H.*

in

PROHIBITION. The declaration stated that whereas "the parish of *Wakefield*, in the county and diocese of *York*, now is, and from time whereof" &c. "hath been, an ancient parish and a parish church belonging to the same; and whereas, during all that time, the said parish hath been and is divided into certain townships, that is to say, the townships of *Wakefield*, *Stanley-cum-Wrenthorpe*, *Alverthorpe-cum-Thorne*, and *Horbury*, and the inhabitants of the said townships have been, during all that time, and still are, liable to contribute to the repairs of the parish church; and whereas, since the making of an act" &c. (3 G. 4. c. 72.) "entitled An Act to amend and render more effectual two acts, passed in the 58th and 59th years of his late Majesty, for building and promoting the building of additional churches in populous parishes, three chapels have been erected and built within the parish of *Wakefield* by virtue of the said act and other acts of parliament then in force for the building of additional churches in populous parishes, that is to say, one chapel

in *Stanley* aforesaid, appropriated to an ecclesiastical district ascertained and marked under and by virtue of the said acts of parliament, and also another chapel in *Alverthorpe* aforesaid, also appropriated to an ecclesiastical district ascertained and marked under and by virtue of the acts aforesaid, and another chapel in *Thornes* aforesaid, not appropriated to any ecclesiastical or other district; and whereas, under and by virtue of the said acts, and by the law of the land, the repairs of the said district chapels of *Stanley* and *Alverthorpe* should be made by the parish at large, or by the districts to which they respectively belong, by rates to be raised within the districts respectively, and the repairs of the said chapel in *Thornes* by the parish of *Wakefield* at large;" and whereas, in the vestry of the said parish church, on the 11th of *August* 1831, the churchwardens and the inhabitants of the said parish, or the major part of them, made a rate upon the parishioners, inhabitants of the said parish, for certain repairs of the said parish church and chapels, by which rate the parishioners, inhabitants of the township of *Horbury*, were not rated to the repairs of the said church and chapels, and the parishioners, inhabitants of the said townships of *Wakefield*, *Stanley-cum-Wrenthorpe*, and *Alverthorpe-cum-Thornes*, only, by the said rate, were rated to the said repairs, excluding *Horbury* and the parishioners inhabitants thereof from contribution of the said rate to the said repairs; and the said plaintiff, before and at the time of the making of the said rate, and thence hitherto, has been, and still is, a parishioner inhabitant in the township of *Wakefield* aforesaid; yet the said defendants, churchwardens of the said parish, well knowing &c., but pretending that the parishioners inhabitants

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of the said township of *Horbury* are not liable to contribute or be rated to the repairs of the said parish church or chapels, by reason of some supposed custom, prescription, or law of the land, and that the repairs of the district chapels aforesaid should and ought to be made by the said parishioners inhabitants of the said townships of *Wakefield*, *Stanley-cum-Wrenthorpe*, and *Alverthorpe-cum-Thornes* only, and that the repairs of a certain chapel in *Horbury* aforesaid have been immemorially made by the parishioners inhabitants of the said township of *Horbury* only, and that the said rate in respect of the said premises was and is a valid rate, and intending to aggrieve, &c.: the declaration then stated the libel of the defendants in the Spiritual Court, alleging a rate to have been made on the parishioners, inhabitants, or persons rateable in the parish, for houses, lands, &c., held, occupied, and enjoyed within the townships of *Wakefield*, *Stanley-cum-Wrenthorpe*, and *Alverthorpe-cum-Thornes*, for the repairs and other expenses of the parish church, the church or chapel of *St. John*, *Wakefield*, and the chapels built as aforesaid under the church-building acts, to which rate the plaintiff was assessed, and which rate was stated to be due to the defendants as churchwardens of the parish of *Wakefield*. The declaration then set out the answer of the plaintiff *Craven*, in which he admitted that the costs of repairing, and other expences of, the parish church, and also the church or chapel of *St. John* to the extent of 100*l.* in any one year, if necessary, under stat. 55 G. 3. c. xxi., local and personal, public (a) (partly set out in a subsequent clause of the answer),

(a) This act was passed to amend a former act of the same reign, for building a new church at *Wakefield*. The clause set out in *Craven's* answer

answer), ought to be defrayed by a rate, but whether by a rate on the whole parish or upon three townships only, excluding *Horbury*, the respondent could not answer; but he submitted that any exemption of *Horbury* ought to have been pleaded in the libel: and he denied that the repairs, &c., of the chapels mentioned in the libel, built under the church-building acts, ought to be paid for by a rate on the three townships, excluding *Horbury*, as he believed that under those acts (particular clauses of which he referred to) the expenses of repairing such chapels, if they really attach to the

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answer (from sect. 4 of the act) was as follows: — “That it shall be lawful for the churchwardens of the said parish of *Wakefield* for the time being, and they are hereby directed and required from time to time, to pay the said commissioners, or the churchwardens of *Saint John's* church aforesaid, out of the church rates of the said parish of *Wakefield*, such sum or sums of money not exceeding in any one year the sum of 100*l.*, as shall be laid out and expended by the said commissioners in cleansing and repairing or maintaining in repair *Saint John's* church aforesaid, and in purchase of books and sacramental bread and wine for the administration of divine service in the said church, and in the payment of the Spiritual Court fees, or as shall be necessary or requisite for those purposes; and such sum or sums of money shall be so paid to the said commissioners or churchwardens of *Saint John's* church, from time to time, within twenty-one days after a notice or requisition shall be given to them for that purpose in writing, signed by the clerk for the time being to the said commissioners.” The same section directs that the said annual sums, and all other moneys necessary for the purposes of the act, “shall and may be raised, assessed, levied and recovered by the same ways and means, and of, upon, and from the same persons, lands, tenements and hereditaments, as the church rates are or may be raised, assessed, levied and recovered by law.” *Craven*, in his answer, complained that the sum for which the present assessment was made consisted in part of 180*l.*, charged in respect of the church or chapel of *Saint John*, being 80*l.* more than the sum limited by statute. *Alexander*, in arguing the present case, referred to this objection. *Cresswell* contra, contended that it did not properly arise on the pleadings, the statement of the libel not being a material or necessary part of the declaration in prohibition; and he cited stat. 1 *W.* 4. c. 21. s. 1.

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parishioners of the parish in which such chapels are built, or any part thereof, belong to the possessors and occupiers of lands, &c., within the whole parish. The declaration then set out the answer of the churchwardens, in which they insisted on the exemption of *Horbury*, and the liability of the other townships, and alleged that *Horbury* had a chapel with all parochial rights (a), which, from time immemorial, had been repaired by the inhabitants of that township: they admitted that the chapels of *Stanley*, *Alverthorpe*, and *Thornes* were built under the church-building acts, and that districts had been assigned to the first two: and they disputed the construction put upon the church-building acts, in *Craven's* answer, as to the general liability of the parish to repair the chapels built under the last-mentioned acts. The declaration then stated *Craven's* answer, in which he denied the exemption of *Horbury* from contributing to repairs of the parish church and chapels, and stated that there was a modern church or chapel at *Horbury*, but denied that the expenses of repairing the same, &c., had been exclusively defrayed by a rate upon *Horbury*. The declaration concluded by praying a prohibition.

Plea. "That the said chapels by the said plaintiff in his said declaration alleged to have been built in *Stanley*, *Alverthorpe*, and *Thornes* aforesaid, respectively, were built in aid of the parish church of the parish of *Wakefeld* aforesaid; and that there now is, and from time immemorial hath been, a church or chapel within the township of *Horbury* aforesaid, at which the inhabitants of the said township of *Horbury* do receive and enjoy, and from time immemorial have received

(a) Sic.

and

and enjoyed, all manner of divine rites and services ; and that the costs and expenses of repairing the said church or chapel, and of providing necessities for the performance of divine rites and services therein, are, and from time immemorial have been, paid and defrayed by rates and assessments upon the possessors and occupiers of houses, lands, and tenements situate, lying, and being within the said township of *Horbury*, and not elsewhere. And the defendants further say that, from time whereof" &c., "no rate or assessment for or towards paying or defraying the expenses of repairing the parish church of *Wakefield* aforesaid has been made, laid, or assessed upon any person for or in respect of any houses, lands, or tenements situate, lying, and being within the township of *Horbury* aforesaid, and that the inhabitants of the township of *Horbury* aforesaid have from time immemorial been exempt and discharged from all liability to contribute to the repairs of the said parish church of the parish of *Wakefield* aforesaid." Verification.

Replication. "That the said chapels were not built in aid of the said parish church of the parish of *Wakefield*, and that there is not, and from time" &c. "hath not been, a church or chapel within *Horbury* aforesaid, at which the inhabitants of the said township of *Horbury* receive and enjoy, and from time immemorial have received and enjoyed, all manner of divine rites and services ; and that the costs and expenses of repairing the said church or chapel, and of providing necessities for the performance of divine rites and services therein, are not, and from time" &c. "have not been, paid and defrayed by rates and assessments upon the possessors and occupiers of houses, lands, and tenements, situate, lying, and being

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being within the said township of *Horbury*, in manner and form" &c.: "and the plaintiff says that the inhabitants of the township of *Horbury* are not exempt and discharged from all liability to contribute to the repairs of the said parish church of the parish of *Wakefield*, and ought to contribute and be rated to such repairs." Conclusion to the country. And inasmuch as the defendants do not deny that the inhabitants of the parish of *Wakefield* at large are not rated to the repairs of the said chapels built in *Stanley*, *Alverthorpe*, and *Thornes* by the said rate in the said declaration mentioned, and because the same makes the inhabitants of *Stanley*, *Alverthorpe*, and *Thornes*, only, defray and support the expenses of repairing the said three chapels built in *Stanley*, *Alverthorpe*, and *Thornes*, and also the parish church of *Wakefield* aforesaid, excluding the inhabitants of *Horbury* from any liability to any or either, he the said plaintiff" &c. (prayer of a prohibition). Issue was joined on the replication.

The proceedings on motion for a new trial in this case are already reported; *Craven v. Sanderson* (a). A new trial having been granted, the plea was amended; and, the record (framed as above set forth) having been sent to the assizes in the form now set forth, the cause was again tried at the *York Spring* assizes, 1836, and a verdict found for the defendants (b). In the

(a) 4 A. & E. 666.

(b) The verdict, as indorsed on the record, was as follows. "That the chapels by the said plaintiff in his declaration alleged to have been built in *Stanley*, *Alverthorpe* and *Thornes* aforesaid, respectively, were built in aid of the parish church of *Wakefield*, and that there now is, and from time immemorial hath been, a church or chapel within the township of *Horbury*, at which the inhabitants of the township of *Horbury* do receive and enjoy, and from time immemorial have received and enjoyed, all manner of divine rites and services; and that the costs and expences of repairing

the ensuing term a rule nisi was obtained for entering judgment, non obstante veredicto, for the plaintiff; and it was ordered that the cause should be set down for argument in the special paper. The case was argued in *Michaelmas* term, 1837 (a).

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Alexander, for the plaintiff. Notwithstanding the verdict, this record shews, first, that *Horbury* is not exempt from contributing to the repair of the parish church. The immemorial enjoyment of divine rites is not of itself a ground of discharge. It lies on those claiming such exemption to shew sufficient reason for it; since, *primâ facie*, every part of the parish is liable to repair the church, 1 *Gibbs. Cod.* 197., tit. ix. c. iv. s. 8. (b), cited in 1 *Burn's Ecc. Law*, 304. tit. *Chapel*. Here no ground is alleged for exempting *Horbury* from the general rule. It is no sufficient reason that *Horbury* has immemorially defrayed the expenses of its own chapel. "If there be a chapel of ease within a parish, and some part of the parish have used time out of

repairing the said church or chapel, and of providing necessities for the performance of divine rites and services therein, are and from time immemorial have been defrayed and paid by rates and assessments upon the possessors and occupiers of houses, lands and tenements, situate, lying, and being within the said township of *Horbury* and not elsewhere; and that, from time whereof the memory of man is not to the contrary, no rate or assessment for or towards paying or defraying the expences of repairing the parish church of *Wakefield* aforesaid has been made, laid, or assessed upon any person for or in respect of any houses, lands, or tenements, situate, lying, and being within the township of *Horbury* aforesaid; and that the inhabitants of the township of *Horbury* aforesaid have from time immemorial been exempt and discharged from all liability to contribute to the repairs of the said parish church of the parish of *Wakefield* aforesaid."

(a) November 10th. Before Lord Denman C. J., Patteson, Williams, and Coleridge Js.

(b) 2d ed., 1761.

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mind, alone, without others of the parishioners, to repair the chapel of ease, and there to hear service, and to marry, and all other things, but only they bury at the mother church; yet they shall not be discharged of the reparation of the mother church, but ought to contribute thereto: for the chapel was ordained only for their ease:" 1 *Burn's Ecc. Law*, 353., tit. *Church*, VI. 8., citing 2 *Roll. Abr.* 289, *Prohibition* (H.), pl. 7. *Degge, Parson's Counsellor*, 208., Part 1. c. 12. (7th ed.), is to a like effect. And in *Com. Dig. Esglise* (G 2.), it is laid down that, "If men usually repair a chapel of ease, and have divine service there, but have burial in the mother church: they are not by that excused from the repair of the mother church." [*Coleridge J.* Both this and the first cited passage suppose some use made of the parish church.] Here the inhabitants of *Horbury* might use it: if reasons of convenience prevent them, that cannot affect any rights. Nor is it a ground of exemption that *Horbury* has never been rated to the repairs of the parish church. In a case (a) cited in *Godolph. Repert.* 153, c. 12, s. 33. (b), it was held to be "contrary to common right, that they who have a chapel of ease in a village should be discharged of repairing the mother church; and it may be that the church being built with stone, it may not need any reparation within the memory of man, and yet that doth not discharge them without some special cause of discharge shewed." Secondly, the record does not shew any exemption of *Horbury* under the church-building acts, 58 G. 3. c. 45, 59 G. 3. c. 134, 3 G. 4. c. 72. By stat. 58 G. 3. c. 45. s. 70., the repairs of the

(a) *Anon. 2 Roll. Rep.* 265.

(b) 2d ed.

two district chapels would have been chargeable on the districts to which they were appropriated; and the repairs of the third, to which no district was assigned, upon the parish at large. But the law in this respect is altered by stat. 3 G. 4. c. 72., which, after reciting the two former statutes, enacts (in sect. 20) as follows. "And whereas doubts may arise as to the repairs of churches or chapels acquired and appropriated, or built or enlarged or improved in aid of the churches of parishes or places, under the provisions of the said recited acts or this act; for remedy and prevention thereof, be it enacted, That all chapels acquired and appropriated, or built or enlarged and improved under any of the provisions of the said recited acts, or under any local acts, in cases in which no provision is made relating thereto in such local acts, in aid of the churches of the parishes or places in which they shall be situated (whether any districts of any such parishes shall have been assigned or not to such chapels as belonging thereto for ecclesiastical purposes), shall be repaired by the respective parishes or places at large to which such chapels shall belong, and rates shall be raised, levied and collected for that purpose, in like manner in every respect as for the repair of the churches of such parishes and places (a)." The rate, therefore, for all the chapels should have been laid upon the parish of *Wakefield* at large.

(a) The remainder of the section is as follows. "And all the laws in force for making, raising, levying and collecting rates for the repair of churches, shall be applied and put in force for the raising, making, levying and collecting such rates for the repair of such chapels, as fully and effectually to all intents and purposes as if the same were severally, separately and specially repeated and re-enacted in this act for that purpose, as to the repairs of such chapels; any thing in the said recited acts, or any other act or acts of parliament to the contrary notwithstanding."

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Cresswell, contra. The argument on the other side must go the length of insisting that *Horbury*, although it should be legally exempt from repairing the parish church, must still repair the district chapels. Stat. 3 G.4. c. 72. s. 20. enacts that chapels built in aid of the churches of the parishes or places in which they shall be situated shall be repaired by the respective parishes or places at large to which such chapels shall belong. The plaintiff's construction must be that the chapel *belongs* to the parish, looking to its whole ambit, and not to the circuit within which aid is actually given to the parish church. But that is not so. The chapel being in aid of the church, the rate is to be raised (as the clause directs) in like manner in every respect as for the repair of the church. Then the only question is whether *Horbury* be liable or not to the repairs of the parish church. If it is to be assumed that the chapel of *Horbury* was built in ease of the inhabitants of that township, there is no exemption, unless something in the nature of a composition be proved; but, if the chapel be taken to have been coeval with the church, the inhabitants are exempt. Now, upon a plea that the inhabitants of *Horbury* have from time immemorial had a chapel there, and received and enjoyed divine rites and services in such chapel, and repaired it, and paid no rate towards the repair of the parish church, but have been exempt from such contribution, a verdict has been found generally for the defendants. Any state of things which will support the verdict is now to be presumed. In the case cited from *Godolph. Repert.* 153. (a) no direct prescription was claimed, but an insufficient reason only was alleged for the supposed exemption: if a proper prescription had appeared, the case would have been different. In *Ball*

(a) *Anon.* 2 *Roll. Rep.* 265.

v. *Cross* (a) *Holt* C. J. said, "those of a chapelry may prescribe to be exempt from repairing the mother church, as where it buries and christens within itself, and has never contributed to the mother church; for in that case it shall be intended coeval, and not a latter erection in case" (ease) "of those of the chapelry." The authorities cited in 1 *Burn's Ecc. Law*, 304, 5, *Chapel* (5), are in favour of such a prescription. It is there said (p. 305, citing 2 *Roll. Abr.* 290, *Prohibition* (H) pl. 11.), that "if the inhabitants of a chapelry prescribe to be discharged time out of mind of the reparation of the mother church, and they are sued for the reparation of the mother church, a prohibition lieth upon this surmise. *Aston v. Castle Birmidge* (b) shews that, if a chapel has been built merely in ease of the inhabitants of the district, they shall be bound to repair the parish church, otherwise not. In *Brown v. Palfry* (c) the plaintiffs in prohibition (being sued for contribution to the repairs of the church) suggested that they had a parochial chapel, and that the inhabitants of the chapelry had, time out of mind, had a parochial chapel and divine service, sacraments, &c., and had used to be exempt from the repair of the parochial church, in consideration of their being charged to the repair of their own chapel, and that they had usually repaired the same; and, the plaintiffs declaring in prohibition, this custom was traversed without objection. It is clear, therefore, that the inhabitants of a district having a chapel, though within the ambit of a parish, may under some circumstances enjoy an exemption from repairing the mother church; those circumstances are to be presumed here, after verdict; and, if *Horbury* be discharged from

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(a) 1 *Salk.* 165. *S. C. Holt*, 138.(b) *Hob.* 66. (5th edit.)(c) 2 *Lev.* 102.

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liability as to the mother church, it is equally so as to district chapels.

Alexander in reply. The effect of the authorities is that if the inhabitants of a chapelry have ever repaired the parish church they shall not be exempted by disusage; *Com. Dig. Esglise* (G 2.); and, even if they never have, it seems doubtful whether they can claim exemption. The real question here, as to the chapels of *Stanley*, *Alverthorpe*, and *Thornes*, is, whether the two which have districts assigned to them should be repaired by the districts, and the other by the parish at large, or all three by the parish at large. Whatever exemption *Horbury* might have in other respects, it could not extend to the new chapels: the reasons of exemption do not apply to them; and the obligation of repairing results directly from stat. 3 G. 4. c. 72.

Cur. adv. vult.

Lord DENMAN C. J. now delivered the judgment of the Court. — This was a suit in prohibition to restrain the parish officers of *Wakefield* from enforcing a rate for the repair of the parish church, and of three chapels belonging to three townships within the parish, two of which chapels were appropriated to districts under the church building acts, and one was not so appropriated. The rate was imposed on all the occupiers within the parish, except those within a fourth township, called *Horbury*. The question was, whether they were properly omitted from the rate. The jury found a verdict in the defendants' favour at the summer assizes in 1834, and again in substance the same verdict on a new trial in the spring of 1836, though the plea had undergone some amendment. We are to determine whether the amended plea states a legal

a legal exemption for that township from the common law liability to be taxed for the reparation of the parish church. The replication, on which the parties went to the country, after stating that the chapels of the three other townships were not built in aid of the parish church (on which however no dispute was raised), further alleged, in denial of the plea, that there is not, from time whereof the memory &c., a church or chapel within *Horbury*, at which the inhabitants of that township receive, and have immemorially received, all manner of divine rites and services, and that the costs and expenses of repairing the said church or chapel, and of providing necessaries for the performance of the same, have not from time immemorial been defrayed by rates and assessments on property in *Horbury*; and that the inhabitants of *Horbury* are not exempted from repairs of the parish church, but ought to be rated and assessed thereto. Then does the affirmative of these facts establish the exemption contended for?

The plaintiff's argument was, that all may be true, and the township of *Horbury* may, notwithstanding, have had a church or chapel originally built in aid, or (as it is sometimes expressed) in ease, of the parish church. It was said that, even before time of memory, the parish might be first created, and the church erected, and afterwards the chapel built; that all parochial rites may have been performed there, the inhabitants of the township taking upon themselves exclusively the burden of repairing it, in which state of things the defendant did not dispute that the liability to contribute to the repairing of the church would not be taken away.

The plaintiff referred to 1 *Gibson's Codex*, 1797., edit. 1761 (p. 221., edit. 1713). No reference was made to the *Constitution of Othobon*, which is copied in the same volume,

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p. 209. edit. 1761. (p. 235. edit. 1713), *De oblationibus capellarum restituendis ecclesiæ Matræ*, which enjoins restitution of offerings from chapels to parish churches, by chaplains called “ministrantes in capellis hujusmodi, quæ salvo jure matricis ecclesiæ sunt concessæ;” which passage shews that chapels have existed without the reservation of any privilege to the mother church, or rather that a parish church and a chapelry may exist within the same parochial boundaries, without the relation of mother and offspring, but independent of each other, and most probably coeval.

In the other place above mentioned *Gibson's* text is no doubt strong in its import; but it is needless to observe that that writer is not to be considered as an authority. The passage is made up of extracts from cases decided in our courts, from which it will be found extremely difficult to deduce any rule of law whatever. In some it is said that a ground of exemption must be stated in pleading, in others that the exemption should be directly averred, and that if it is qualified with “ratione inde” it will be bad. In some cases it is holden that to leave out of a church rate certain parishioners or districts is no ground for prohibition, in others the writ has been granted for that reason without any hesitation. In a case between *Aston* and *Castle Birmingham*(a) the Court held that the inhabitants of a chapelry sued for a rate raised for repairing a parish church did not entitle themselves to a prohibition by shewing that they had, in fact, repaired their chapel, and had performed there the rites of baptism and marriage, if they buried at the parish church. On all hands it was agreed that the mere fact of repairing their own place of worship gave no exemption. These authorities could

(a) *Hob.* 66. (5th edit.). 2 *Ro. Ab.* 289; *Prohibition* (H), pl. 7.

hardly

hardly have supplied any safe rule for the decision of the present case ; but at a later period Lord *Holt* had to deal with a case, the circumstances of which were almost identical with *Aston v. Castle Birmidge* (a) ; and, though there was no necessity for laying down the principle on which legal exemptions must depend, yet he has explained it in a clear and satisfactory manner. In *Ball v. Cross* (b) he said “ that by common law the parishioners of every parish are bound to repair the church.” “ In the principal case, those of a chapelry may prescribe to be exempt from repairing the mother-church, as where it buries and christens within itself, and has never contributed to the mother-church ; for in that case it shall be intended coeval, and not a latter erection.” But he observed “ that the chapel could be only an erection in ease and favour of them of the chapelry ; for they of the chapelry buried at the mother-church till *Henry* the Eighth’s time, and then undertook to contribute to the repairs of the mother-church.” We have then the opinion of this learned judge, at a time when the doctrine of prohibition was far from obsolete, that, where the chapelry has from beyond memory performed all its own parochial rites and services, it shall be intended coeval and exempt from contribution ; and such is the effect of the plea. It might, perhaps, be argued that the fact of its being coeval ought to have been pleaded, and the opinion of the jury taken upon the proof ; but in truth it seems much more reasonable to say that the law will presume its independence and coeval antiquity from facts susceptible of clear proof, which cannot be conceived to have existed if it were a mere chapel of ease. At any rate, if that fact is ne-

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(a) *Hob.* 66. (5th edit.) 2 *Ro. Ab.* 289 ; *Prohibition* (H), pl. 7.

(b) 1 *Salk.* 164. *S. C. Holt*, 138.

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cessary to constitute exemption, it must be taken, after verdict, to have been proved to the satisfaction of the jury, who would unquestionably have drawn the inference from what they must have found in sustaining the defendant's plea.

Another point was made on the effect of the church-building acts, in connection with a local act for the parish of *Wakefield*, set out in the pleadings. That act, passed in 55 G. 3., enacts that the parish church of *Wakefield*, and a chapel of *St. John* in *Wakefield*, are to be repaired by a rate, without saying on whom the rate is to be levied. The declaration also alleges that three new chapels have been, under the statutes of 58 & 59 G. 3., built within the parish. Now, the 58 G. 3. c. 45. s. 70. imposes the repair of district churches and chapels on the districts to which they may be assigned. The 59 G. 3. c. 134. s. 14. authorises and empowers churchwardens of any parish, with consent of the vestry, to raise money for the repair of *any* churches or chapels (i. e. any within the parish) on the credit of the rates; and then 3 G. 4. c. 72. s. 20., reciting that "doubts may arise as to the repairs of churches or chapels" built under the provisions of the two former acts or of this act, "for remedy and prevention thereof" (i. e. of the doubts), enacts, (His Lordship then read the section already set out, p. 889. antè.). From these clauses in the three acts taken together, a right is claimed to rate the parish at large (of course including *Horbury*) for the repairs of the district chapels; as neither by the church-building acts, nor by the local act, is any express provision made relating to the levy of rates. And, if this liability had been thrown on *parishes* at large without "*places*," the words could hardly have been satisfied by any other construction.

But

But the addition of that word shews that other divisions besides parishes were considered capable of coming under the church-building acts; and the studious preservation of all laws then in force seems to keep the power of imposing rates precisely as it was then actually existing in each place. The *place*, then, for which rates may be imposed in respect of the new chapels in *Wakefield*, is the whole parish minus *Horbury*; for the law then in force excluded it from the parish for that purpose. We therefore think the plea good, as disclosing a substantial defence at common law, and open to no objection from the recent statutes.

Rule discharged (a).

(a) In *Easter Term*, 1838 (*May 10*), *Cresswell* moved for a rule to shew cause why the Master should not review his taxation of costs, on the ground that he had refused to allow any costs for the first trial, or for shewing cause against the rule for the second, no mention of costs of the first trial having been made in such rule. *Cresswell* contended that *R. Hil. 2 W. 4. I. 64.* (3 *B. & Ad.* 383.), could not be acted on here. Under stats. *Marlebridge* (52 *H. 3. c. 6.*) and *Gloucester* (6 *E. 1. c. 1.*) the Court has a discretion: and would, in ordinary cases, be entitled to act upon a rule such as that of *Hil. 2. W. 4. I. 64.* But stat. 1 *W. 4. c. 21. s. 1.* gives the successful party in prohibition "the costs attending the application and subsequent proceedings." This comprehends all the costs occasioned by the proceedings in prohibition; and leaves the Court no discretion, except as to amount.

The Court (Lord *Denman C. J.*, *Patteson* and *Coleridge Js.*) said that there appeared to be no reason for taking the case out of the ordinary rule, but that they would consider the point; and afterwards, in *Trinity Term*, 1838 (*June 13th*), Lord *Denman C. J.* said that the costs of the first trial were not to be allowed.

Rule refused.

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The rule *Hil. 2. W. 4. I. 64.*, that, where a new trial is granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second, applies to issues in prohibition, even since stat. 1 *W. 4. c. 21. s. 1.*

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Tuesday,
January 21st.

MOORE *against* RAMSDEN, Clerk.

R. granted an annuity, charging it, by deed, on two ecclesiastical benefices holden by him, S. and W., which he thereby demised on trusts to secure the annuity.

He at the same time executed a warrant of attorney to the grantee, reciting the annuity deed, and stating that, for further securing the regular payment of the said annuity, he thereby desired and authorised certain attorneys, &c.; the rest of the instrument being in the common form of a warrant of attorney to suffer judgment in an action of debt. The amount for which judgment was to be entered was twice the purchase-money of the annuity.

There was no defeasance. Held, that the warrant of attorney was not void as charging the benefices contrary to stat. 13 Eliz. c. 20.

Under the authority of the above deed, the grantee sequestered the living of W. for arrears of the annuity; and afterwards, under the same authority, and to satisfy arrears of the annuity, he obtained possession, by ejectment, of the living of S. The profits of W. were not sufficient to pay off the arrears for which the sequestration had issued; the profits of S. were sufficient, but arrears had accrued since the sequestration, and the profits of the two livings were insufficient to discharge all.

Held, that the grantee might pay the growing arrears out of the profits of S., and keep up the sequestration upon W. to pay the arrears due at the time of issuing that process.

SIR W. W. FOLLETT, in *Trinity* term, 1836, obtained a rule to shew cause why the warrant of attorney in this case, and the judgment and sequestration, should not be set aside, on the ground (stated in the rule) that the warrant of attorney was given to secure an annuity, and with intent that a sequestration might issue charged on the ecclesiastical benefices of the defendant; and that the sequestration was kept on foot as a charge upon the said benefices.

The defendant was rector of *Great Stainbridge* in *Essex*, and vicar of *Little Wakering* in the same county. By indenture of fourteen parts, dated 19th of *January* 1825, between the defendant, the plaintiff, *Elizabeth Machon*, administratrix of *Elizabeth Fisher*, *T. H. Shepherd*, *T. Groves*, and *B. Flight*, and several other parties, it was recited that the defendant had granted an annuity of 260*l.*, by indenture of *February* 18th, 1813, to *E. Fisher*, with a demise, by the same indenture, of the rectory of *Great Stainbridge* and the glebe, &c., for a term, in trust for securing payment of the annuity by the ways and means therein mentioned; another annuity to *T. H. Shepherd*, by indenture of *September* 6th, 1816,

with

with a demise of the same rectory, &c., on the like trust; another annuity to *T. Groves* by indenture of *June 24th*, 1820, with a demise of the vicarage of *Little Wakering*, with the glebe, &c., on the like trust; and a fourth annuity to *B. Flight*, by indenture of *June 5th*, 1823, with a demise of the said vicarage, &c., on the like trust; which annuities were to be repurchased as in the indenture was mentioned: that defendant had agreed for the purchase of an annuity at the price of 4400*l.* by the plaintiff, who had agreed, out of the purchase-money, to repurchase the former annuities: and it was witnessed that, in consideration &c., defendant granted plaintiff an annuity of 574*l.* 9*s.*, for the term of ninety years; and defendant covenanted that, if any part of the annuity should be in arrear twenty days next after &c., the plaintiff should be at liberty to enter upon the rectory and vicarage, and distrain; and that, in case of an arrear for twenty-eight days, he should be at liberty to enter and take the rents, tithes, profits, &c., until he should be paid and satisfied the said annuity and all arrears due at the time of entry, and such as should grow due while he should be in possession by virtue of such entry. The indenture also contained a demise of the rectory and vicarage to the plaintiff and others, upon trust, in case any part of the annuity should be in arrear thirty days, to raise so much as should be in arrear by leasing, mortgaging, &c. There was also a covenant that, in case of an arrear for thirty days, the plaintiff, if he deemed it necessary, might sequester the rectory and vicarage, or either of them. By the same indenture, and in pursuance of the agreements therein contained, the four first-mentioned annuities were assigned on certain trusts. The inden-

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ture further recited that defendant had executed a warrant of attorney of even date therewith, to confess judgment for 8800*l.*, &c., on which it was intended to enter up judgment in K. B., such judgment to be a collateral security only for the better and more effectual payment of the said annuity to the plaintiff, and that no execution was to be taken out thereupon until some quarterly payment should be in arrear for twenty days; but defendant covenanted that, so often as any part of the annuity should be in arrear for that period, it should be lawful for plaintiff to sue out such execution for recovery of the arrears &c. There was, lastly, a clause empowering the defendant, upon certain terms, to repurchase, in which event the annuity, and the powers, &c., under the deed should cease &c., and satisfaction should be entered up in pursuance of the warrant of attorney, or the judgment be assigned to or in trust for the defendant.

The warrant of attorney was executed at the same time with the annuity deed, which it recited, and in part set forth. The provisions of the deed as to a warrant of attorney were not noticed, except that there was a general reference to the covenants, and that the clause of repurchase was stated, with the agreement for entering satisfaction upon, or assigning, the judgment to be entered on the warrant of attorney in the deed mentioned. After this recital, the warrant of attorney proceeded, "Now, therefore, for the further securing of the regular payment of the said annuity or yearly sum of 574*l.* 9*s.*, these are to desire and authorise you," &c.: the instrument then went on, in the common form, to authorise the attorneys therein named to receive a declaration in an action of debt for money borrowed,

confess

confess the action or suffer judgment by non sum informatus, &c. for 8800*l.*, and execute a release of errors. There was no defeasance.

Judgment was entered up on the warrant of attorney, *March* 3*d*, 1825, and a *levari facias* issued thereupon in *June* 1833, to recover 861*l.* 13*s.* 6*d.*, being (as was stated in the affidavit in support of the rule) the whole or part of the arrears then due in respect of the plaintiff's annuity. Afterwards, in the same month, the Bishop of *London* granted a sequestration of the vicarage of *Little Wakering* to the party entitled under the annuity deed, whose receiver from that time took, and at the time of this application was still taking, the tithes and profits. In *February* 1836, the defendant was arrested and imprisoned for debt; in the following *March* he was discharged under the Insolvent Debtors' Act; and on *March* 29*th*, 1836, his effects were assigned over by the provisional assignee.

The affidavits in opposition to the rule added the following facts. In *Michaelmas* term 1831 a rule nisi was obtained for setting aside the above warrant of attorney, the judgment, and a sequestration which had then issued thereupon, on the ground that the warrant of attorney was given to secure an annuity and with intent that a sequestration might issue, charged on the ecclesiastical benefices of the defendant. The affidavit of the defendant in support of that rule stated nearly the same facts with those sworn by him on the present application, so far as the present affidavit bore upon the validity of the warrant of attorney, judgment and sequestration. In *Hilary* term 1832 (*January* 14*th*), after argument, this Court ordered, "That the sequestration in the said rule mentioned be set aside from the present

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present time, and that so much of the said rule as respects the warrant of attorney and judgment be discharged:" and "that it be referred to the Master to take an account of the sums received by the plaintiff under the said sequestration to the present time, and of the arrears of the annuity due; and, if it shall appear that the plaintiff has received under the said sequestration more than was due for arrears of annuity, that he pay over such balance to the defendant (a)." Some proceedings were had before the Master, and an account was furnished as directed by the rule; but the defendant neither stated any objection, nor proceeded with the reference; and the Master did not report.

In 1832 the parties entitled under the annuity deed brought an action of ejectment for the rectory of *Great Stainbridge*, which was tried at the *Essex* Spring assizes, 1833; when the defendant attempted to invalidate the deed: but, under the direction of Lord *Lyndhurst* C. B., a verdict was found for the plaintiff. A new trial was moved for, and refused (b); and, a writ of possession being sued out on *July* 18th, 1833, the parties entitled under the deed were put into possession, and have continued in the receipt of the profits ever since.

At the time of issuing the *levari facias* on which the sequestration of *Little Wakering* was grounded, 861*l.* 13*s.* 6*d.*, arrears of the annuity, were due; the net amount levied from that vicarage since the *levari facias* did not exceed 201*l.* 7*s.* 6*d.*; nor did the whole net amount received from the defendant, or levied on

(a) *Moore v. Ramsden*, note (d) to *Britten v. Wait*, 3 B. & Ad. 917. S. C. *Lumley on Annuities*, 238.

(b) *Doe dem. Broughton v. Gully*, 9 B. & C. 344., was held to be in point.

both

both the benefices, ever discharge the annuity; and from the time of issuing the sequestration there has always been an arrear exceeding 861*l.* 13*s.* 6*d.* (a).

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Kelly and *Channell* shewed cause in *Trinity* term 1837 (b). The warrant of attorney in this case did not, either in its terms, or by its legal effect, constitute a charge on the defendant's ecclesiastical benefices (c): it makes no difference that there are other instruments by which the annuity is charged upon them. If the warrant of attorney, on the face of it, disclose no illegality, it is not to be impeached; *Colebrook v. Layton* (d). And *Britten v. Wait* (e), *Johnson v. Brazier* (g), and *Saltmarshe v. Hewett* (h), establish the same principle. The former case of *Moore v. Ramsden* (i) did not essentially differ from this; and there the Court refused to set aside the warrant of attorney. As to the complaint that the sequestration is kept on foot for growing arrears, in the former case of *Moore v. Ramsden* (i) that was so, and the Court limited the operation of the process accordingly; but, since the termination of proceedings on that sequestration, a new *levari facias* and sequestration have been issued for arrears actually due; and possession has been obtained of the rectory of *Great Stainbridge* by ejectment. The arrear due at the time

(a) It was assumed, in the judgment, that enough had been received from the proceeds of *Great Stainbridge* to pay the difference between 201*l.* 7*s.* 6*d.* and the amount due at the time of issuing the *levari facias*.

(b) May 22d. Before Lord Denman C. J., *Littledale*, *Patteson*, and *Williams* Js.

(c) See stats. 13 *Eliz.* c. 20., 43 *G. 3.* c. 84., 57 *G. 3.* c. 99.

(d) 4 *B. & Ad.* 578.

(e) 3 *B. & Ad.* 915.

(g) 1 *A. & E.* 624. *S. C.* 3 *N. & M.* 654.

(h) 1 *A. & E.* 812. *S. C.* 3 *N. & M.* 656.

(i) 3 *B. & Ad.* 917. note (d). *S. C. Lumley on Annuities*, 238.

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of issuing the last sequestration has never been discharged by the levy under that process; and, a large arrear still remaining due, the plaintiff is entitled to say that the process is not yet satisfied. He may avail himself of it to recover that arrear, and may apply the profits of *Great Stainbridge* in discharge of the arrears newly accruing. The defendant's insolvency, and the assignment by the provisional assignee, cannot affect the rights of parties who have obtained a sequestration; *Bishop v. Hatch (a)*. (This was not contested).

Sir *W. W. Follett*, contra. The sequestration could, at all events, stand good for such arrears only as had accrued since the issuing of the sequestration disposed of by the rule of *Hilary* term 1832, and remained unpaid. But, before the execution issued against *Little Wakering*, an ejectment had been brought for the rectory of *Great Stainbridge*, and profits received, sufficient to pay off the arrear since that sequestration issued. The annuitants profess to reserve the profits of the rectory for accruing arrears, and appropriate the produce of the sequestration only to former ones; but this is, in reality, keeping the sequestration alive for the purpose of paying off the growing arrears. Then as to the deed and warrant of attorney. The deed is clearly bad, as charging the defendant's ecclesiastical benefices. The warrant of attorney recites the grant of an annuity to the plaintiff, and the former grants redeemed by him; it is given "for the further securing of the regular payment of the said annuity" of 574*l.* 9*s.*, and has no defeasance stating that the judgment shall be entered up only for arrears actually due; it is therefore intended

(a) 1 *A. & E.* 171.

to be a continuing security for arrears to accrue, and is like the warrant of attorney in *Saltmarshe v. Hewett* (a). The present is, indeed, a stronger case than that; for there, by the defeasance, no execution was to issue until payment should be twenty-one days in arrear. The warrant of attorney in this case does not in terms charge the benefices, nor did that in *Saltmarshe v. Hewett* (a); but the court there was of opinion that the instrument, on the face of it, was so clearly connected with deeds charging the benefice as to be void within stat. 13 *Eliz. c. 20.*; and the same law applies here. In *Johnson v. Brazier* (b) the warrant of attorney, which was held to be on the face of it good, was in the common form, not incorporating any deed. In *Colebrook v. Layton* (c) the deed was not incorporated with the warrant of attorney, as here. If the deed and warrant of attorney here can be held good as to *Great Stainbridge*, they are at all events void as to *Little Wakering*, because the former annuities charged upon that benefice, and which the plaintiff, as the deed states, agreed to repurchase, were created after the passing of stat. 57 *G. 3. c. 99.* The sequestration, therefore, must be set aside as to the vicarage. [*Patteson J.* On the former motion in *Moore v. Ramsden* (d) was any distinction taken between the two benefices?] None appears to have been taken: perhaps the sequestration in that case had not issued against both (e).

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Cur. adv. vult.

(a) 1 *A. & E.* 812.

(b) 1 *A. & E.* 624.

(c) 4 *B. & Ad.* 578.

(d) 3 *B. & Ad.* 917. note (d). *S. C. Lumley on Annuities*, 238.

(e) On reference to the papers, it appears that in that case both the benefices had been sequestered.

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Lord DENMAN C. J. now delivered the judgment of the Court.

In 1813, i. e. in the interval between the statutes 43 G. 3. c. 84. and 57 G. 3. c. 99., when the 13 *Eliz.* c. 20. was repealed (*a*), the defendant, the incumbent of the rectory of *Stainbridge*, in consideration of a loan from the Plaintiff, agreed to charge his said living with an annuity, and to demise it in case of non-payment to a trustee for the plaintiff, for securing both such payments as might then be due, and such as might thereafter become due. Under this deed the trustee recovered by ejectment, in 1833, possession of the rectory, and has received the profits to the extent of 661*l.* for the plaintiff's benefit. In 1825, when the repeal of 43 G. 3. c. 84. had restored the operation of 13 *Eliz.* c. 20., the defendant, in consideration of further advances, granted another annuity to the plaintiff, and secured it both on the rectory and on another living of which he was incumbent, *Little Wakering*. One of the instruments executed by the defendant on that occasion was a deed of fourteen parts, demising the living, and authorising the plaintiff to enter upon the premises and distrain for the annuity, and to sequester the living: it recited the intention to execute a warrant of attorney of even date as a collateral security only for the better payment of the annuity; that no execution should issue till after twenty days' default; but that, in such case, it should be lawful for the plaintiff to sue out such execution or executions as he should think fit. The warrant of attorney expressly refers to the annuity deed reciting these provisions after a statement of the negotiations be-

(*a*) See stat. 43 G. 3. c. 84. s. 10, stat. 57 G. 3. c. 99. s. 1, and *Shaw v. Prichard*, 10 B. & C. 241.

tween

tween these parties and others respecting money raised for the defendant's benefit; and, for further securing the regular payment of the annuity, authorises judgment to be entered up forthwith against him for 8800*l.*, being double the amount of monies advanced by the plaintiff to him, or for his benefit; but no power to sequester is either expressly given or by reference to the indenture; and, as the whole amount of arrears due exceeds the profits of the rectory of *Stainbridge* actually received by 200*l.*, the plaintiff has issued execution for this sum, and sequestered *Little Wakering* to raise it. The defendant obtained a rule for setting aside the warrant of attorney, judgment, and sequestration, on the ground that they were charges on an ecclesiastical benefice; and my brothers *Littledale*, *Patteson*, *Williams*, and I have heard the case argued.

The very same motion was previously made by the same defendant in the same cause; and in *Hilary* term, 1832, the rule was discharged by Lord *Tenterden* and my brother *Patteson*. We cannot, however, properly act upon that decision, because the short note of it proves that the facts were not quite correctly brought before the Court, inasmuch as, on looking at the warrant of attorney as set out in the affidavit, we find it to contain no defeasance whatever, and no mention of sequestering, but merely the common authority to enter up judgment for double the sum secured. Such a warrant of attorney has in no case been held a charging of the benefice; and it is unnecessary for us to discuss the decision in *Saltmarshe v. Hewett* (a), or that in *Newland v. Watkin* (b), on which it was, in a great measure,

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(a) 1 *A. & E.* 812.(b) 9 *Bing.* 113.

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founded. But, as we have been led to a perusal and examination of the numerous cases that have occurred of late years, we think it right to state that *Newland v. Watkin (a)*, which is very shortly reported in 9 *Bing.* 113, accompanied by no judgment of the Court beyond a direction in what form the rule should be made absolute, is given with the full argument of the Lord Chief Justice in the *Law Journal*, 1st vol. of the N. S., p. 177.

The sequestration, then, of *Little Waking* has taken place under a warrant of attorney which is not a charging of the benefice. But the application was to set aside the sequestration, on the ground that it had issued for arrears subsequently accruing, all due at the time having been paid out of the proceeds of *Stainbridge*. But we think the plaintiff has a right to apply these proceeds as he thinks proper, and may keep those latter proceeds on account of the new arrears, while he keeps those of *Little Waking* for such as became due before.

The rule must be therefore discharged.

Rule discharged.

(a) 9 *Bing.* 113.

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DOE on the Demise of BROUGHTON *against* Thursday,
STORY. January 25th.

EJECTMENT for messuages, lands, &c., in *Surrey*. Under stat. 7 G. 4. c. 57. s. 19., an assignment by the provisional assignee to the creditor assignee is valid if it pursue, *mutatis mutandis*, the form, annexed to the act, for the conveyance by the insolvent to the provisional assignee, under sect. 11. And this independently of stat. 11 G. 4. & 1 W. 4. c. 38. s. 7., passed subsequently to the execution of the assignment. Supposing it necessary to resort to the later statute, *quære*, whether evidence, sufficient to go to a jury, of the conveyance having been made "in obedience to any order" of the Insolvent Debtors' Court, be given by producing a copy of the counterpart, sealed

On the trial before *Tindal C. J.*, at the *Surrey* Spring assizes, 1836, it appeared that the lessor of the plaintiff claimed through *Bennett*, an insolvent debtor. *Bennett* was discharged by the Court for the relief of insolvent debtors in 1829. On *September 22d*, 1827, he executed an assignment to the provisional assignee, according to the form annexed to stat. 7 G. 4. c. 57. *English*, a creditor, was afterwards duly chosen assignee; and the provisional assignee assigned to him on 28th *February*, 1829. A copy of the conveyance to the provisional assignee, and a copy of the counterpart of his conveyance to *English*, from the records of the Court, under the seal of the Court, were put in, with the certificate of the provisional assignee indorsed upon them. The indenture of assignment of 28th *February*, 1829, was between *Henry Dance*, the provisional assignee, of the first part, and *English* of the second. It recited the assignment of *September 22*, 1837, and witnessed that, "in obedience to an order of the Court for relief of insolvent debtors," and of 10s., the provisional assignee, at the request and with the consent of *English*, "hath conveyed, assigned, transferred, and set over, and by these presents doth convey, assign, transfer, and set over, unto the said *James English*, his

with the seal of that Court, and certified by the provisional assignee, such counterpart reciting that the conveyance is made by order of the Court?

Semble, per Lord Denman C. J., *Littledale*, and *Williams Js.*, that it is not; per *Cole-ridge J.*, that it is.

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heirs, executors, administrators, and assigns, all the estate, right, title, interest, and trust of, in, and to the real and personal estate and effects whatsoever and wheresoever, and of what nature or kind soever, which by virtue of the said hereinbefore in part recited indenture now are in any way vested in the said *H. Dance* as such provisional assignee as aforesaid, together with their and every of their rights, members, and appurtenances, to have and to hold, receive and take, all and every the said estate, effects, and premises, and every part thereof, conveyed, assigned, transferred, and set over, with their and every of their rights, members, and appurtenances, unto the said *James English*, his heirs, executors, administrators, and assigns, according to the respective natures, properties, and tenures thereof, in trust nevertheless for the use, benefit, and advantage of the creditors of the said insolvent who shall be entitled to share in a dividend of the said estate and effects, and to and for such other uses, intents, and purposes, and in such manner and form, as are in and by the said indenture expressed of and concerning the same, and to and for no other use, intent, or purpose whatsoever. In witness" &c.

The Court afterwards removed (a) *English*, and appointed the lessor of the plaintiff and the defendant assignees in his stead; and it subsequently removed the defendant and appointed the lessor of the plaintiff sole assignee. No proof was given of any order of the Court directing the assignment by the provisional assignee to *English*; and it was objected, for the defendant, that the assignment to *English* by the provisional assignee did not pass the property. The Lord Chief

(a) Under stat. 7 G. 4. c. 57. s. 38., which vests the property in the new assignees without any fresh conveyance.

Justice considered the title sufficiently proved; and the plaintiff had a verdict, leave being given to the defendant to move for a nonsuit. In *Easter* term, 1836, Sir *W. W. Follett* obtained a rule accordingly.

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Platt and *Turner* now shewed cause (a). First, the conveyance by the provisional assignee is valid by stat. 11 G. 4. & 1 W. 4. c. 38. s. 7. That section recites that it is expedient to prescribe a form of conveyance by the provisional assignee, and to remove doubts as to the validity of previous conveyances. It then prescribes a form for such conveyances in future; and it also gives validity to "every conveyance and assignment at any time heretofore made and executed by the provisional assignee for the time being, in obedience to any order of the Court for relief of insolvent debtors." It was objected that no order was proved; but the Court must presume, according to the principle of *Rex v. Whiston* (b), that the provisional assignee did not act without an order; the rather as the assignment recites the order. And, by stat. 7 G. 4. c. 57. s. 19., the counterpart, verified as here, is sufficient evidence of such conveyance and assignment (c). If, however, these answers (d) shall be held insufficient, the question will

(a) Besides the points mentioned in the text, objections to the title of the insolvent were made and discussed; but, as the Court considered them of no weight, it is not thought necessary to report the argument upon them.

(b) 4 A. & E. 607; and see *Rex v. Witney*, 5 A. & E. 191.

(c) By stat. 2 W. 4. c. 44. s. 2., instead of a counterpart, a duplicate of the conveyance by the provisional assignee is to be filed of record, and is made evidence as the counterpart formerly was.

(d) It was also argued that the defendant, having himself taken as assignee under the conveyance, could not now dispute its validity: to which it was answered that the defendant was not shewn to have ever acted in the character of assignee.

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be, whether the doubts referred to in stat. 11 G. 4. and 1 W. 4. c. 38. s. 7. be well founded. Now stat. 7 G. 4. c. 57. has, annexed to it, a form for the conveyance to the provisional assignee, but none for a conveyance over by him. Upon this it is contended that the provisional assignee was to convey by some instrument taking effect either at common law or by the statute of uses, &c., as by feoffment, bargain and sale, lease and release, &c. But sect. 19, which directs the provisional assignee to convey, also directs that his conveyance shall vest the estate of the insolvent in the new assignee by relation as effectually as if the original conveyance had been made to him. Now the original conveyance, as appears by sect. 11 and by the form annexed to the statute, conveys not only the present but the future estate of the insolvent. The forms of conveyance suggested could not convey this: the intention of the legislature must therefore have been to prescribe a new mode of conveyance by the act, operating according to its provisions: and the proper method was to follow, as has been done, the form annexed to the act, *mutatis mutandis*. As the two conveyances are to have the same effect, the forms of conveyance were meant to be similar: and it was not thought necessary to annex more than one form.

Sir *W. W. Follett* and *Channell*, *contra*. First, as to the effect of the conveyance under stat. 7 G. 4. c. 57. only, it is not to be inferred, from the legislature conferring validity on a new form of conveyance in one instance, that they meant to give such a form validity in all. The more correct inference is that, as they gave it expressly in one instance, they did not mean to give it validity

validity where the act was silent. At any rate, there is no expression of intention strong enough to give effect to a conveyance which (it is admitted) would be inoperative without the statute. And the statute form is inapplicable to the case of a conveyance by the provisional assignee. It contains a proviso making it void in case the petition is dismissed. Now, as the conveyance to the provisional assignee is made at the time of petitioning, this is correct: but, if applied to a conveyance made by the provisional assignee to the creditor assignee, which may be after the discharge of the prisoner, it will be unnecessary; and indeed it is unnecessary whenever such conveyance is made, as the proviso in the first conveyance avoids the assignee's title at an earlier stage, in the event of the petition being dismissed. Then, as to stat. 11 G. 4. & 1 W. 4. c. 38. s. 7., it gives effect to previous conveyances only when executed by order of the Court. The doctrine of presuming *omnia ritè acta* cannot apply to a case where the legislature expressly makes the existence of a fact an essential condition to a new enactment taking effect. The clause at the end of sect. 19 of stat. 7 G. 4. c. 57. merely makes the counterpart evidence of the fact that the provisional assignee conveyed, and of his title, but does not make it evidence of any fact asserted in the deed.

Lord DENMAN C. J. The question which we have to consider is, whether the title of the insolvent has passed to the lessor of the plaintiff; for, as to the objections urged against the insolvent's title, they are not supported by the slightest authority. Stat. 11 G. 4. & 1 W. 4. c. 38. s. 7., to remove doubts as to previous conveyances by the provisional assignee, sets up those conveyances

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veyances which had been theretofore made by any order of the Court. I confess I doubt whether, when the legislature gives validity only to what is done by order of the Court, it is not necessary to prove the order. The hypothesis is that something wrong has been done, which is to be cured; and I doubt whether, in such a case, the rule of presuming that all has been rightly done will apply. The act, however, does not declare that the former conveyances are void, but merely alludes to doubts upon the point. We are therefore thrown back to the question, whether the assignment be void with reference simply to stat. 7 G. 4. c. 57. Now, when I look at the eleventh and nineteenth sections, the doubt which it was afterwards thought fit to remove does not appear to me to be of so serious a nature as to induce me to hold the assignment void. Sect. 11 gives the power to assign to the provisional assignee; and a form is annexed, which dispenses with the necessity of lease and release, or bargain and sale, transferring all present and future estate of the insolvent by a single instrument. Then sect. 19 directs the provisional assignee to convey and assign to the creditor assignee, and the conveyance is to vest all the estate in the latter, by relation, as effectually and legally "as if the said conveyance and assignment had been made by such prisoner to him." I cannot doubt that the form which is good for one purpose is good for the other; if not, I do not see how the future estate could be transferred to the creditor assignee. On this short ground I think the title good without resorting to the late act.

LITLEDALE J. I have felt some doubt on one point: I rather think that, to make a conveyance good
 under

under stat. 11 G. 4. & 1 W. 4. c. 38. s. 7., an order should be proved, the conveyance not being in the regular course of the proceedings of the court. But, under stat. 7 G. 4. c. 57., I think the conveyance good. It is true that stat. 19 does not point out how the provisional assignee is to convey; but the words of the section, when compared with those of sect. 11, shew that the legislature intended a similar form to be used in the two cases, the reason being the same in each instance, and no new provision being introduced by sect. 19.

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WILLIAMS J. No mode of conveyance would have effectuated the object of the eleventh and nineteenth sections of stat. 7 G. 4. c. 57. so well as that adopted here. In *Moult v. Massey* (a) the assignees of a bankrupt departed from the usual form of assignment, and their assignment was held invalid: though I do not say that the case of a bankrupt's assignees is, in all respects, the same as that of an insolvent's assignee. But, at any rate, here no other method of conveyance would have been completely effectual. Then, coupling sects. 11 and 19 together, and recollecting that no form is given for the transfer directed in sect. 19, the language and objects of the two sections being similar, I think the form given in one case should, as nearly as possible, be followed in the other. As to the aid to be derived from stat. 11 G. 4. & 1 W. 4. c. 38. s. 7., I feel much doubt. If the conveyance be treated as a nullity under stat. 7 G. 4. c. 57., and a substantive act be necessary to give it validity under stat. 11 G. 4. & 1 W. 4. c. 38.,

(a) 1 B. & Ad. 636.

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it rather seems to me that distinct proof of such substantive act becomes necessary : though I give no positive opinion upon this point.

COLERIDGE J. Without reference to stat. 11 G. 4. & 1 W. 4. c. 38., I think the conveyance good. But, as that statute recites the existence of doubts only, and as the practice of the Court under stat. 7 G. 4. c. 57. s. 19. is shewn, I think that there was sufficient evidence to go to a jury of the conveyance having been made under an order of the Court, supposing it necessary to resort to the later statute. To try this, put the later act out of the question. Then the facts stand thus. The provisional assignee, an officer of the Court, having no power to assign without order of the Court, makes a conveyance, and the counterpart is filed of record in the Court. All this is done in compliance with the act. Then the counterpart is verified by the seal of the Court, which the Court keeps, and which the Court only can affix : we must presume that it is not affixed without authority. And the record of the Court, executed by its officer, and verified by its seal, recites the conveyance to have been made by order of the Court. On the facts standing thus only, I think it not too much to presume that there was an order of the Court ; and the presumption is much strengthened by the language at the conclusion of sect. 19, which declares a document verified as in the present case to be sufficient evidence of the conveyance and assignment.

Rule discharged.

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REAY *against* PACKWOOD.Friday,
January 26th.

ASSUMPSIT on a bill of exchange drawn by *Banks* on defendant, accepted by him, and indorsed by *Banks* to *Goode*, and by *Goode* to plaintiff. The defendant pleaded payment, which the plaintiff traversed, and issue was thereon joined. On the trial before Lord *Denman* C. J., at the sittings in *London* after *Trinity* term 1836, the defendant called *Goode*, the second indorser, to prove a settlement of accounts between him and the plaintiff, in which the plaintiff received satisfaction for the bill now declared upon. The witness, being examined on the voir dire, stated that he had received money from the defendant to pay the bill to the plaintiff. It was urged that he was incompetent on this account; but the Lord Chief Justice over-ruled the objection. The witness gave evidence, and the defendant had a verdict.

In assumpsit on a bill of exchange, by indorsee against acceptor, issue being joined on a plea of payment, a prior indorsee is a competent witness for the defendant, though he acknowledges, on the voir dire, that he received the money from defendant to pay plaintiff the bill.

Erle, in the ensuing term, moved for a rule to shew cause why there should not be a new trial, on the ground that *Goode's* evidence ought not to have been admitted. The examination on the voir dire shewed him to be interested. If he received money from the defendant, undertaking to pay this bill, he was liable to the defendant for the amount, and for the costs of this action; and if he obtained the money from the defendant by wrongfully representing himself as the holder, he is liable in tort for the amount of the bill, and costs. The judgment of Lord *Tenterden*, in *Edmonds*

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monds v. Lowe (a), shews the principle on which evidence under such circumstances is excluded. [*Patteson J.* mentioned *Birt v. Kershaw (b)*.] In more recent cases than that, the liability to costs has been held to turn the scale against a witness's admissibility, where he was otherwise indifferent; *Jones v. Brooke (c)*, *Larbaestier v. Clark (d)*. [*Patteson J.* That is where the liability arises from circumstances of the transaction independent of his having been agent. Where a party has merely acted as agent, it may be questioned whether the rule of liability applies.] A rule nisi was granted; and now

F. V. Lee shewed cause. The fact of *Goode* being an indorser was not sufficient to exclude him; *Jordaine v. Lashbrooke (e)*. The circumstances in *Edmunds v. Lowe (a)* were very different: here the question is simply whether, in an action between indorsee and acceptor, a prior indorsee may prove payment. If the plaintiff fails in this action, *Goode* is liable at his suit on the bill.

Erle, contra. *Goode* is interested in protecting the defendant, because he, if the plaintiff recovers, may sue *Goode* for a breach of duty in not paying over money which he received from the defendant, either in the way of bailment, or as the consideration of a contract; and *Goode* would be liable for the costs of this action. [*Coleridge J.* Was he any thing more than agent for the purpose of paying the bill?] He was answerable to the defendant for breach of duty in not paying it. [*Coleridge J.* So is my servant if I send him to pay a

(a) 8 B. & C. 407.

(b) 2 East, 458.

(c) 4 Taunt. 464.

(d) 1 B. & Ad. 899.

(e) 7 T. R. 601.

bill;

bill; yet I may call him as a witness to prove the payment.] *Goode* is party to the bill. [Lord *Denman* C. J. It is clear that no agent would be competent to prove that he paid a debt, if this objection could prevail.] If he has been guilty of fraud in not paying it, he has an interest. This was agreed in *Larbalestier v. Clark (a)*. [Little *dale* J. A supposition of that kind might exclude every witness who had paid money as agent.]

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Per Curiam (b),

Rule discharged.

(a) 1 B. & Ad. 899.

(b) Lord *Denman* C. J., Little *dale*, *Williams*, and *Coleridge* Js.

BALLEY *against* DE ARROYAVE.

Friday,
January 26th.

ASSUMPSIT on a charter-party of affreightment.

The material clause of the instrument, as set out in the declaration, was as follows: "Ninety running days were to be allowed to the said merchant, if the ship was not sooner dispatched, for unloading and loading the ship at *Accra*, *Whidah*, or any other ports or places on the coast of *Africa*, to commence on arrival at *Accra* or *Whidah*, whichever might be her first port of report, being in all respects ready to unload, and having

By charter-party, a vessel was to have ninety running days, and ten days of demurrage, to commence from her arrival at *W.*, being ready to unload and having received pratique. Declaration for breach of the charter-party stated that,

although the vessel, on *August* 24th, was at *W.* ready to unload, and had received pratique, yet defendant did not, within ninety &c. commencing on her arrival at *W.* and being ready to unload and receiving pratique, unload and load the vessel, but wrongfully detained her beyond the running days and days of demurrage. Plea, that the vessel was not ready to unload, and did not receive pratique, for a long time after her arrival at *W.*, viz. for a time equal to that of the alleged wrongful detention: conclusion to the country. Issue thereon.

It appeared in evidence that the vessel was ready, and at liberty, to unload at *W.* on *August* 14, but had not gone through any form of receiving pratique, there being no quarantine establishment at *W.* nor any means of formally granting pratique.

Held, that the issue on the plaintiff's part, affirming that the vessel had received pratique, was sufficiently borne out by the proof; for that she must be taken to have received pratique when she was at *W.* ready, and at liberty, to unload.

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received pratique, and so continue whilst trading to or at any other ports or places on the coast, casualties excepted, and end on her being finally loaded and dispatched, and ten days on demurrage over and above the said laying days, at 4*l.* 4*s.* per day. Penalty for non-performance of that agreement, 1000*l.*" Breach, "that, although *Whidah* aforesaid was the first ordered port of report of the said ship or vessel, according to the true intent and meaning of the said charter-party of affreightment in that behalf, and although," viz. on 14th *August* 1833, "the said ship or vessel was there in all respects ready to unload her outward cargo aforesaid, and had then and there received pratique, whereof the defendant then and there had due notice, yet" defendant not regarding &c., but contriving &c., "did not nor would, within the said ninety running days and the said ten days of demurrage in the said charter-party of affreightment mentioned, commencing on the arrival of the said ship or vessel at *Whidah* aforesaid and being in all respects ready to unload and receiving pratique as aforesaid, unload and load the said ship or vessel as aforesaid, although no casualties happened to prevent the defendant from so doing, but therein failed and made default; and, on the contrary thereof, he, the defendant, wrongfully kept and detained the said ship or vessel for a long time over and above the said running days and days of demurrage respectively, in and about the unloading and loading of the said ship or vessel as aforesaid, to wit eleven days" &c. "Whereby the plaintiff was put to great costs, charges," &c.

Pleas: 1. Non assumpsit. 2. "That the said ship was not ready to unload her outward cargo aforesaid, and did not receive pratique for a long time after her arrival

arrival at *Whidah* aforesaid, to wit for a space of time equal to the time during which it is in the declaration alleged that the defendant wrongfully kept and detained the said ship or vessel over and above the said running days and days of demurrage respectively." Conclusion to the country. 3. That defendant did not keep the said ship or vessel over and above the said running days and days of demurrage as in the declaration alleged, for any part of the time therein mentioned, &c. Conclusion to the country. Issue was joined on these pleas. There was a fourth plea, not material here, which also led to an issue in fact.

On the trial before Lord *Denman* C. J., at the sittings in *London* after *Trinity* term 1836, the charter-party was read, containing the clause declared upon. It appeared that the vessel arrived at *Whidah* (on the western coast of *Africa*) on the 12th of *August*, and was ready to unload on the 14th; that she never went through any form of receiving pratique; and that, when she left *Whidah* (*December* 4th), she had exceeded the ninety running days and ten days of demurrage. It appeared in evidence that there is no health establishment or quarantine, and no pratique given, on this part of the *African* coast; that *Whidah* belongs to a native chief; and that there is no notary or consul there. The Lord Chief Justice, in summing up, stated that, on the second issue, the plaintiff had undertaken to prove the receipt of pratique; and, consequently, that the opinion of the jury, as to that issue, could be taken only on the simple question, whether she had received pratique or not, which, his Lordship said, she clearly had not. The jury found, on the second issue, that the vessel was ready to unload on the 14th

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of *August*, but had not received pratique; and, on the third issue, that she was detained ten days beyond the ninety and the ten days mentioned in the charter-party. The first, third, and fourth issues were found for the plaintiff. On the second, the verdict was taken for the defendant, but leave given to move to enter a verdict for the plaintiff. In the ensuing term *Erle* obtained a rule to shew cause why such verdict should not be entered, or a new trial had.

Sir *J. Campbell*, Attorney-General, and *Channell* now shewed cause. The Court has no power, under these circumstances, to alter the verdict found on a material issue. The plaintiff in his declaration has averred (as the terms of the charter-party required) that the ship was ready to unload, and had received pratique. The plea traverses the receipt of pratique, and the plaintiff, by joining issue, re-asserts it. On the trial it appears that pratique could not be obtained; but that does not entitle the plaintiff to a verdict on the issue. He should have pleaded in excuse according to the fact.

Erle and *Wightman*, contra. The plaintiff is entitled to a verdict on this issue, or, at any rate, to a new trial. The jury have found that there was a point from which the ninety days actually began to run: that point is the beginning to unload. The argument for the defendant implies that the running days never commenced. As to pratique, a vessel receives it when she has liberty to unload without impediment from laws of quarantine. Where such laws are in execution, vessels arriving from suspected countries must have a certificate to enable them to unload; and this is called being admitted to pratique.

pratique. The word itself means liberty to unload. Thus in tit. 1. art. 1. of the *French Ordonnance* of 7th August 1822, given in *Merlin's Répertoire universel et raisonné de Jurisprudence*, tom. 26. p. 162. (a), *Quarantine*, No. VII., it is said: "Les provenances par mer ne sont admises à libre pratique, qu'après que leur état sanitaire a été reconnu par les autorités ou agents préposés à cet effet." If the vessel arrives at a place where there is no officer to examine and certify, that makes no difference to the shipper; he looks only to the actual liberty of unloading; how he has it is immaterial. If the words of this charter-party had been "had," instead of "received," pratique, no question could have arisen: and it is sufficient here that the ship in fact had it. She had all the pratique that could be obtained. Even where there are officers of quarantine, a vessel coming from a country not suspected has pratique without any form being gone through. The defendant could not lose any thing by the plaintiff's construction. The form of receiving a certificate could have given him no additional advantage. The facts, therefore, substantially bear out a finding for the plaintiff on these issues. In *Plowd.* 101. (b) it is laid down that, "when the substance of the fact, and the manner of the fact are put in issue together, if the jurors find the substance and not the manner, yet judgment shall be given according to the substance." The same doctrine is exemplified in *Mackalley's Case* (c), and in *Rubery v. Stevens* (d). [*Lit- tledale J.* The plea here is a singular one. It concludes to the country; but it does not contradict the facts in

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(a) 5th ed. *Brussels*, 1827.(b) *Matters of the Crown happening at Salop. Case of the Salisburys.*(c) 9 *Rep.* 67 a.(d) 4 *B. & Ad.* 241.

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the declaration.] Strictly considering the plea, it admits that the vessel did receive pratique; the only question is when. To all practical purposes she had it from the 14th of *August*. [*Littledale* J. I suppose that, under the circumstances, the moment she began to unload, that fact would be evidence that she had then received pratique.]

LORD DENMAN C. J. We think that must be taken to be the meaning, on this particular charter-party. It struck me on the trial that, as the plaintiff had in effect stated that the vessel did receive pratique, and not matter in explanation of her failing to receive it, he was not entitled to a verdict on this issue. But I now think that the time contemplated must be the time when she received pratique in the only way in which she could have it at that place. The rule for entering a verdict must therefore be absolute.

LITTLEDALE, WILLIAMS, and COLERIDGE Js., concurred.

Rule absolute.

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The QUEEN *against* The Churchwardens, Overseers, and Inhabitants of the Parish of St. SAVIOUR, SOUTHWARK.

Monday,
January 29th.

MANDAMUS, issued *January* 31st 1837, reciting King James I. by charter granted the rectory of St. Saviour's, Southwark, in trust as follows. That, by stat. 22 and 23 Car. 2. (a), entitled "An Act for making the manor of Paris

for the churchwardens of the parish and their successors, enjoining them, out of the revenues, to pay certain yearly salaries to chaplains and a schoolmaster, and to repair the parish church.

By stat. 22 & 23 Car. 2. c. 28. (private), reciting that the revenues of the rectory were insufficient for the above purposes, the parishioners were discharged from all tithes belonging to the rectory; and it was enacted that, in consideration thereof, it should be lawful for the churchwardens for the time being, and overseers, giving notice to, or calling together six or more of the inhabitants, having certain qualifications, to assemble yearly in vestry, and make a rate not exceeding 350*l.* in a year; and that the churchwardens should pay yearly for ever to the chaplains, schoolmaster, and usher, salaries amounting in the whole to 230*l.*, which sums should be in lieu of all monies payable to the chaplains, &c., by virtue of the charter; and all the residue of the monies so to be raised should be applied to repairs of the church and other church affairs, as the wardens should think meet.

Stat. 56 G. 3. c. 1*v.* (reciting that the rate before mentioned, and the revenue of the rectory under the management of the wardens, were inadequate to the above purposes) repealed the former act as to the amount to be raised by rate, and enacted that, for the purposes of that act, it should be lawful for the wardens, overseers, and other inhabitants of the parish, in vestry, and they were thereby empowered, to make an annual rate, as there described, which rate should be confirmed by two justices of the peace, and the sum levied should be applied as follows, viz. the wardens should pay yearly to the chaplains, schoolmaster and usher, certain salaries (which were specified), and such salaries should be in lieu of all monies payable to them by virtue of the charter, and the residue should be applied as directed by the former act.

The wardens, overseers, and inhabitants met in vestry, and refused to make a rate; the salaries remained unpaid, and the church was dilapidated. On motion for a mandamus to compel the making of a rate for the purposes of the above statutes: Held, that the ordering of such rate was not a matter of ecclesiastical jurisdiction; and that a mandamus might issue to the wardens, overseers, and inhabitants.

On return to the mandamus, the Court refused to hear the return discussed on motion to quash (the ground alleged being the urgency of the circumstances), but directed that the case should be argued on an early day upon concilium.

Held, on such argument, that, although a revenue might be still derivable from the rectory, a rate under the statutes was the primary fund from which the salaries were to be paid, and that the alleged existence of such revenue was no answer to the mandamus.

Held, further, that such mandamus, since stat. 56 G. 3. c. 1*v.*, was properly directed to the wardens, overseers, and other inhabitants generally, and not to the wardens, overseers, and six or more qualified inhabitants, according to stat. 22 & 23 Car. 2. c. 28.

Return to the mandamus was made by the wardens, two overseers, and six inhabitants, and a further return by five inhabitants. On the concilium, the former parties did not dispute the making of the rate, but contended only that the mandamus was improperly directed. The latter denied that a rate could properly be made. After quashing the return, the Court ordered (under stat. 1 W. 4. c. 21. s. 6.) that the wardens, overseers, and inhabitants should pay costs, but that the wardens and overseers should not be personally liable as such.

(a) C. 28. private.

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Garden a parish, and to enable the parishioners of *St. Saviour's, Southwark*, to raise a maintenance for ministers, and for repairs of their church;" after providing that the manor of *Paris Garden* should be formed into a parish, to be called *Christchurch*, it is recited that King *James I.*, by his letters patent of 12th *April*, in the 9th year of his reign, "granted the rectory and parsonage impropriate of the parish church of *St. Saviour's, Southwark*, to certain persons and their heirs, in trust for the wardens of the said parish church and their successors, enjoining them out of the revenue thereof to find and maintain two preaching chaplains, and a schoolmaster and usher for their free grammar school, and to repair their parish church, and to pay their chaplains 60*l.* per annum, and their schoolmaster and usher 30*l.* per annum; but that, the said parish church being a very great church, and very chargeable to be maintained in due reparation, and the revenue of the said rectory not amounting to above 100*l.* per annum, communibus annis, the same would not extend to repair the said church, and to allow any reasonable maintenance to the said chaplains," for redress thereof it was enacted "that all the parishioners of the said parish of *St. S. S.*, and all the inhabitants of and within the same, and all the messuages, lands, tenements, and hereditaments within the said parish, should be for ever thereafter exonerated, acquitted, and discharged of and from all tithes and tenths belonging to the said rectory and parsonage impropriate, and the said messuages, lands," &c., "should be for ever thereafter holden and enjoyed tithe free, acquitted and discharged of and from payment of any tithes or tenths, and all sum and sums of money payable for or in lieu of tithes; and in consideration thereof that

that it should and might be lawful to and for the churchwardens for the time being of the said parish, and the overseers of the poor of the said parish, or the greater number of them, giving notice unto or calling together six or more of such inhabitants as had within the space of seven years then last past borne the like office therein, to assemble themselves yearly in the vestry-house of the said parish church, upon every *Tuesday or Wednesday in Easter week*, and they or the greater number of them then present should yearly, for ever, then or within fifteen days after, make and settle a tax, rate, or assessment, not exceeding " (above charges for collecting) " 350*l.* in any one year, to be imposed or set upon all the parishioners of the said parish of *St. S.*, and upon all the possessors and occupiers of all houses, lands," &c., "in the same, or within the limits," &c., thereof (with an exception as to the said parish of *Christchurch*), which tax, rate, or assessment, should be by an equal pound rate, &c., and should be paid quarterly, &c. " And that the wardens of the said parish church of *St. S.*, and their successors, should by equal quarterly payments, pay yearly for ever unto each of the said two chaplains thereof, the yearly sum of 100*l.*; and to the schoolmaster and usher aforesaid the yearly sums of 30*l.*; that is to say, 20*l.* per annum thereof to the schoolmaster and 10*l.* per annum thereof to the usher; which said several sums to be paid to the said chaplains, schoolmaster, and usher respectively, as aforesaid, should be in lieu of all monies to them respectively payable or to be paid by virtue of the said letters patent, or any appointment therein: and all the residue of the monies so to be raised as aforesaid, should from time to time be applied and disposed of for and towards the repair of the said parish church of

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That by another act of 56 G. 3. (a) entitled "An Act to enlarge the powers of an act" (setting out the title of stat. 22 & 23 Car. 2. c. 28.), it was, amongst other things, enacted that so much of the said act of 22 & 23 Car. 2. as respects the amount to be raised by rate should be, and the same was, thereby declared to be repealed (b); and it was further enacted that, for the purposes of the same act (56 G. 3.), it should and might be lawful to and for the wardens, overseers of the poor, and other inhabitants of the said parish, in vestry assembled, and they were thereby empowered, from and after the passing of the same act, yearly and every year upon notice thereof publicly given, &c., to make or cause to be made an assessment upon all and every person and persons, &c. (describing the assessment, the persons upon whom, and the property in respect of which, it was to be made, and the amount to which the rate was to be limited) (c); and it was further enacted that such rate or assessment, so to be made as aforesaid, should be confirmed and allowed by and under the hands and seals of two of his majesty's justices of the peace for the said county of *Surrey*: and all such sum and sums so assessed should from time to time be collected and paid by the collectors, to be applied as thereafter mentioned, that is to say, the said wardens and their successors should by equal quarterly payments pay yearly for ever unto each of the said two chaplains the yearly sum of 300*l.*, and unto the schoolmaster and

(a) C. lv., local and personal, public.

(b) Sect. 1.

(c) Sect. 3.

usher aforesaid the yearly sum of 30*l.*, that is to say, 20*l.* per annum thereof to the schoolmaster, and 10*l.* per annum thereof to the usher aforesaid, which said several sums should be paid on &c. (mentioning four days in the year); the payment of which sums should commence on &c., to the said chaplains, schoolmaster and usher respectively as aforesaid, and should be in lieu of all monies to them respectively payable or to be paid by virtue of the said letters patent, or any appointment therein; and all the residue, &c., should be applied for and towards the repairs of the church, and other matters &c., as directed in the former act, p. 927. antè (a).

That there is now due to each of the chaplains 150*l.*, and to the schoolmaster and usher 30*l.* And that the said church of *St. Saviour's* is now in a very dilapidated state, and requires immediate repairs. That application has been duly made to the churchwardens for payment to the chaplains, schoolmaster, and usher, which they have neglected and refused to make: and also application to the churchwardens and overseers of the poor, and inhabitants of the parish, to make a rate for the purposes aforesaid, in pursuance of the said acts of parliament, but that they have neglected and refused to make such rate.

The mandatory part of the writ ran as follows:—
“We,” &c., “do command you, the said churchwardens and overseers of the poor, and inhabitants of the said parish of *St. S. S.*,” “that immediately after the receipt of this writ you do call a vestry and make a sufficient rate for the purposes in that behalf aforesaid, in pursuance of the provisions of the said act” (22 & 23 *Car. 2. c. 28.*),

(a) Sect. 5.

“and

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“and also of the said act” (56 G. 3. c. lv.), “or that you shew us cause” &c.

Return (filed *April* 20th, 1837,) by the wardens, two overseers, and six inhabitants of *St. Saviour's*, stating that, by stat. 32 *H.* 8. (c. 15. private), the parishioners of the same parish, amongst themselves, are yearly to nominate churchwardens, who shall be a corporation: that the sums mentioned in the mandamus are due to the chaplains, schoolmaster, and usher, and that the church is dilapidated, and requires immediate repair, and that the wardens have been applied to for payment of the sums due to the chaplains, &c. That they could not pay, by reason that they had not in their possession or power any sum or sums collected under stat. 22 & 23 *Car.* 2. c. 28., or stat. 56 G. 3. c. lv., or otherwise howsoever. That application has also been made to the wardens and overseers to make a rate as in the writ mentioned. That the wardens and overseers and inhabitants in vestry assembled considered the application, and neglected and refused to make any rate, as they lawfully might under the said acts, and also because any rate to be made under the said acts can or may be made by the said wardens and the overseers, or the greater number of them, and six or more of such inhabitants as within seven years last past have borne the like office, or the greater number of them then present, in vestry assembled, upon notice thereof given in the parish church upon &c., and not otherwise, or at any other time, or in any other manner.

The return then stated that after the issuing of the writ a vestry was holden, at which the wardens and several of the overseers and other inhabitants assembled: that a rate of 6*d.* in the pound, being a sufficient rate for the purposes of the said acts, was moved for, and
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the motion was seconded, but negatived on a poll (all the wardens, and two out of three overseers present, voting in the minority); and no other rate was proposed, or has since been made. That the said acts empower the wardens and overseers and other inhabitants to make a rate yearly, but do not compel them. That after the coming of the writ the wardens, overseers, and other inhabitants assembled in vestry, in pursuance of the said acts, and in obedience to the writ, and did resolve not then to make any rate in pursuance of the said acts, and did then neglect and refuse to do so, as they lawfully might under the said acts. That after the coming &c. the said wardens, &c., in vestry &c., did neglect &c. to make a rate; because any rate to be made under the said acts can or may be made, &c. (assigning the same reason as in the part of the return stating a refusal before the writ; *antè*, p. 930.).

A further return was made (*a*) by five of the inhabitants (*May* 6th 1837), to the following effect. That, after the application to the churchwardens, &c., to make a rate, the wardens, overseers, and inhabitants in vestry considered the same, and neglected &c. to make any rate, as they lawfully might under stat. 22 & 23 *Car. 2. c. 28.*, and because they had no power to make a rate for the purposes aforesaid under stat. 56 *G. 3. c. 1v.*

That *Henry VI.* incorporated certain parishioners of the parish of *St. Margaret, Southwark*, by the name of The Wardens of the Guild of the Assumption of our Blessed Lady, with power to them to purchase lands, which they did. That, by statute of 28 *Henry VIII. (b)*, the parishioners of *St. M., S.*, were incorporated by the

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(*a*) See, as to the circumstances under which these returns were made, p. 941. *post.*

(*b*) *C. 14. private.*

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name of The Wardens of the Parish Church of *St. Margaret*, in *Southwark*, with like power. And that, by statute of 32 H. 8. (a), reciting that the monastery of *St. Mary Overy*, in *Southwark*, had been dissolved, and that the parish church of *St. Margaret*, *Southwark*, had been prostrated and converted to another use, and that the parishioners of *St. Margaret* aforesaid, and of *St. Mary Magdalen Overy*, at the time of the passing of that act, repaired to the said late monastery of *St. Mary Overy*, there jointly, as inhabitants of one parish, to hear divine service, and that the said church of *St. M. O.* was a very great church, and very costly to be maintained, it was at the supplication of the said parishes of *St. Margaret*, and *St. Mary Magdalen*, amongst other things enacted that the said parishes should be united and knit together, and that the said late monastery should be the parish church, and be called the parish church of *St. Saviour of Southwark*:” that the parishioners of the same parish should yearly elect churchwardens, who should be a corporation, and have and enjoy all lands, revenues, &c., which at any time were in the possession of the wardens of *St. Margaret* and *St. Mary Magdalen Overy*, jointly or severally, by reason of their said corporations, and also the lands, &c., purchased as above-mentioned by the wardens of the Guild of the Assumption.

That King *James I.*, by letters patent of the ninth year of his reign, granted the rectory and parsonage impropriate of the parish church of *St. Saviour's*, *Southwark*, and all the premises, hereditaments, and appurtenances, which were formerly parcel of the possession of the late priory of *St. Mary Overy*, and afterwards parcel of the possessions of *John Paynett*, late bishop of *Winchester*, (except the advowsons of all churches and

(a) C. 15. private.

vicarages

vicarages to the said premises appertaining) to the wardens of the said parish church of *St. Saviour's*, and their successors; and the said last-mentioned wardens did covenant for themselves, and their heirs and assigns, to and with his said Majesty, his heirs and successors, that they would, at their own proper costs and charges, maintain one learned man to the place of schoolmaster of a certain grammar school within the said parish of *St. Saviour*, and one other learned man to the place of usher of the same school, and should pay 20*l.* a year to the said schoolmaster, and 10*l.* a year to the said usher, and, further, that they would maintain two pious chaplains, would pay yearly to the said chaplains 60*l.*, and would pay all other charges, expenses, and sums of money out of the said rectory of ancient time issuing or to be paid, and his said Majesty, his heirs, and successors therefrom and from every parcel thereof from thenceforth for ever would acquit, exonerate, and keep harmless. And the return stated that the charge of repairing the said parish church of *St. Saviour* is a charge out of the said rectory so granted by King *James I.* to the last-mentioned wardens as aforesaid of ancient time issuing and to be paid, and that the said last-mentioned wardens and their successors are bound by the covenants in the said letters patent contained to pay as well all charges for repairs and other necessary reparations to the said church, as also the said stipends in the said letters patent mentioned.

That divers messuages, lands, &c., were purchased by the wardens of *St. Saviour* under the said letters patent and acts of parliament, and of large annual value, to wit 1000*l.*, which sum is sufficient year by year to repair the parish church of *St. Saviour*, and to pay the said stipends: and that the said last mentioned wardens
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and the revenue of the said rectory under their care and management are now, and both of them are, primarily liable to pay the said stipends and to repair the said parish church. That stat. 56 G. 3. c. lv. recites (a) that the sum allowed to be raised by stat. 22 & 23 Car. 2., and the revenue of the rectory, under the care and management of the wardens, are inadequate to repairing the church and increasing the stipends, and authorises the making of a rate for those purposes; but no act exempts the said wardens or the said revenue from the primary liability above-mentioned, but the sole object of the acts in the writ mentioned in that behalf was to render it lawful for a rate to be made in aid of the said primary liability and of the said revenue, but not without contribution from the said wardens or the said revenue. And that the wardens have always paid the chaplains their stipends out of the said revenue until *June* 25th, 1836, from which time they have neglected and refused so to do, or to repair the church, or to appropriate any sum out of the revenue under their management for those purposes.

The return then stated that, after the coming of the writ, and in obedience thereto, the wardens of the said

(a) The recital of stat. 22 & 23 Car. 2. c. 28, is given in the commencement of the mandamus, *antè*, p. 926. The recital in stat. 56 G. 3. c. lv. s. 1., above alluded to, is as follows. "And whereas the sum allowed to be raised by the said last-mentioned act, and the revenue of the said rectory, under the care and management of the said wardens, are inadequate to the repairing the said church, and increasing the stipends and sums of money heretofore paid to the said chaplains, which are not now an adequate remuneration for the duties required of them, and ought therefore to be increased; and it is therefore necessary and expedient that power should be given for raising further and additional rates in the said parish for the repair of the said church, and enabling the wardens of the said parish to make better provision for the chaplains appointed from time to time to perform the ecclesiastical duties in the said church and parish; but the same cannot be effected without the aid and authority of parliament."

church,

church, and several of the overseers and other inhabitants, met in vestry: that, a majority being desirous of having a committee appointed to investigate the state of the said revenue, and report to a future meeting, in order that a proper return might be made, a motion for such committee was put (but not from the chair, the chairman, who was one of the wardens, refusing) and carried by a majority, but the chairman refused to make a minute of the resolution: that a rate of 6*d.* in the pound was then moved for and the motion seconded, which rate the return alleged to be more than sufficient, and improper; and the wardens and overseers and inhabitants, on a poll, negatived such motion, as they lawfully might under the acts mentioned in the writ, and also because the last-mentioned wardens are liable under the letters patent of King *James* and the above-mentioned acts, some or one of them, to pay the stipends and repair the church as aforesaid, and they have wholly refused so to do.

The return finally stated that "we, the said inhabitants," have not the power to call any assembly of the wardens, overseers, and inhabitants to make a rate in pursuance of the said acts; and, after the vestry holden as above stated, there has been no assembly of the wardens, overseers, and inhabitants in vestry at which we could make a proper rate for the purposes of the acts. And, as to the part of the mandamus which commanded the making of a rate for repair of the church, that it is not within the jurisdiction of the courts temporal, but solely within that of the courts spiritual, to enforce the making of a church-rate (*a*).

A rule

(*a*) The motion for a mandamus in this case (*Michaelmas* term, 1836), was grounded on affidavits setting forth the material parts of the statutes of

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A rule was afterwards obtained to shew cause why the return made by the several parties above mentioned should not be quashed. In the present term
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of 32 H. 8. (c. 15.), 22 & 23 Car. 2., and 56 G. 3., recited in the writ and returns, and of the charter of James I., with the covenant of the wardens, stated in the second return. The affidavits also represented that the church was dilapidated; and that the salaries of the chaplains, school-master, and usher, were unpaid, the reason alleged being want of funds, in consequence of the refusal of a rate as next mentioned: that, at a vestry called for the purpose, among other things, of making a church-rate, and holden August 1st 1836, it had been voted that the making of such rate should be postponed to the 31st of July following; that no church-rate had been made for 1836; that a committee appointed in last April to examine into the wardens' accounts, especially as to the distribution and application of the various charity estates, had reported that the receipts, unassisted by a church-rate, fell below the expenditure (including the above salaries) by 1009*l.* 19*s.* annually: And that there were no funds other than those above mentioned, out of which the salaries could be paid, and the church repaired.

Affidavits were made in opposition, stating, among other things, that the proceeds of the above mentioned parochial estates would be sufficient to pay the salaries without a rate, if applied to that purpose in the first instance; but that such proceeds were in fact used in the first instance for purposes to which they were not properly applicable (and which were enumerated): and that the church, in its then condition (as to which allegations in detail were made), afforded sufficient accommodation for those who were in the habit of frequenting it. A rule nisi having been granted,

Thesiger, for the churchwardens, shewed cause in Hilary term 1837 (January 30th), and stated that they were willing to do what the Court should direct, but that a difficulty was apprehended in compelling the inhabitants to make a rate, if a vestry should be called, and they should again refuse: and he cited *Rex v. The Churchwardens of St. Peter, Thetford*, 5 T. R. 364, *Rex v. The Churchwardens of St. Margaret*, 4 M. & S. 250. In the first of those cases it was said, that the making of a church-rate was a matter of ecclesiastical jurisdiction, and therefore no mandamus could go; but *Rex v. The Churchwardens of St. Mary, Lambeth*, 3 B. & Ad. 651, may afford an answer to that objection.

Hill, for certain of the inhabitants. This is a matter of ecclesiastical jurisdiction. Payment of the salaries in question was substituted for the
payment

(January 18th) Sir J. Campbell, Attorney-General, shewed cause, and contended that, as the return was not frivolous or contemptuous, it ought to be argued in the

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payment of tithes, and is to be enforced by such remedies as were applicable to the tithe itself. Now tithes are not recoverable in the temporal courts except by statute; and, indeed, stat. 2 & 3 Ed. 6. c. 13. s. 1. does not make the tithes themselves recoverable at law, but only the treble value. It can make no difference, here, that the composition is established by act of parliament. And, further, the Court will not issue a mandamus to a popular assembly, without seeing how obedience is to be ultimately enforced. He then discussed the statements made on affidavit, as to the state of the church, and the application of the parish funds.

Sir F. Pollock (with whom were Sir W. W. Follett and R. V. Richards), *contrâ*. The rate called for is not, properly speaking, a church-rate. It is "a tax, rate, or assessment," required by an act of parliament to be imposed for certain purposes therein specified. If an ecclesiastical court attempted to enforce such a statutory assessment, prohibition would lie. It is the more clear that this rate is a matter of temporal cognizance, as stat. 56 G. 3. c. lv. s. 5. enacts, "That such rate or assessment, so to be made as aforesaid, shall be confirmed and allowed by and under the hands and seals of two of His Majesty's justices of the peace for the said county of Surrey:" and sect. 20 gives an appeal to the quarter sessions against such rate. The Ecclesiastical Court could not enforce an allowance of the rate by two justices. The suggestion, that the salaries ought to be paid, in the first instance, out of the revenues of the parochial estates, is contrary to the express directions of stat. 22 & 23 Car. 2. c. 28, and of stat. 56 G. 3. c. lv. (He was then stopped by the Court.)

Lord DENMAN C. J. We think that the only question here is, whether, under the statutes, the Court has power to interfere: but, as to the other points, it is clear that the wardens are not bound to employ the other funds which have been referred to in payment of these salaries, before a rate is made. Any representation as to the state of the church will properly be made on return to a mandamus. We think that the provision for allowance of the rate by two justices clearly prevents it from being a matter of ecclesiastical cognizance. The statute 22 & 23 Car. 2. c. 28. exempts the parishioners from tithe, and, in consideration thereof, enacts that it shall and may be lawful for the churchwardens and overseers, calling together certain inhabitants, to make a rate out of which the salaries are to be paid, the residue to be applied in repairing the church.

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the usual course, on a concilium, and not decided upon summarily and without power of review, as it would be if disposed of on motion (a). Sir *F. Pollock*, contra, insisted that the motion ought to be heard, the case being urgent, inasmuch as the subsistence of parties depended upon it, and the rate being required to pay a debt due under an act of parliament. *The Court* (b) observed that the case, if set down in the crown paper, would have been heard in course during this term; and it was finally ordered that the argument should take place, on a concilium, on the following *Wednesday*. On *Wednesday, January 24th* (c),

Sir *F. Pollock* moved (on concilium) that the return should be quashed. By stat. 22 & 23 *Car. 2. c. 28.*, the parishioners receive the direct benefit of a discharge from tithes, "in consideration" of which it is made "lawful to and for" the parish officers, calling together certain inhabitants, to assemble in vestry and make a rate not exceeding 350*l.* in any one year, 130*l.* to be

The act 56. *G. 3. c. lv.* enacts that it shall be lawful for the wardens, overseers, and other inhabitants, in vestry, and they are thereby empowered, to make an assessment, applicable to the same purposes. The vestry, therefore, are in the same situation as the parish officers were before, as to the making of the rate; and, if they will not do it, we must compel them, as we should formerly have compelled the parish officers. If there is any objection, it may be stated in a return. *Rex v. The Inhabitants of Wix*, 2 *B. & Ad.* 197., shews that a mandamus may be directed to the inhabitants.

WILLIAMS J. concurred. (*Littledale* and *Coleridge* Js. were absent. See 6 *A. & E.* 387. note (c).)

Rule absolute.

(a) See the point in *Rex v. Payn*, 6 *A. & E.* 403. decided immediately after the case in the text.

(b) Lord *Denman* C. J., *Littledale*, *Williams*, and *Coleridge* Js.

(c) Before the same Judges.

applied

applied in payment of the salaries, and the residue in repairs of the church, and other matters concerning the administration of church affairs: the salaries to be in lieu of all monies payable to the chaplains, schoolmaster, and usher, under the letters patent of *James I.* Stat. 56 G. 3. c. lv. repeals the former act as to the amount of salaries, and directs an increased payment to the chaplains, schoolmaster, and usher, also in lieu of all monies payable to them under the letters patent; the rate, for the purpose of such payment, to be assessed by the wardens, overseers, and other inhabitants, in vestry. It is assumed in the return made by the wardens and overseers that, although the first statute is repealed as to the amount of salaries, it remains unaltered as to the parties who are to make the rate, which, therefore, ought to be made by the wardens, overseers, and six or more qualified inhabitants mentioned in that act. But stat. 56 G. 3. c. lv., while it increases the amount, also changes the parties by whom the rate for providing that increased amount is to be imposed. The former powers are not extended to the new impost. It is also suggested, by the same return, that the acts, by using the words "shall and may be lawful," and "they are hereby empowered," only authorise, and do not compel, the making of a rate. But this is a public duty, imposed by statute for a just consideration; the power given for the performance of such a duty must be exercised, unless the statute expressly leaves a discretion, and "may," in such a case, is equivalent to "shall:" 7 *Bac. Abr.* 451, *Statute* (1) 1.(a); *Rex et Regina v. Barlow* (b); *Rex v. Commissioners of the Flockwold In-*

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(b) 2 *Salk.* 609.

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Hindmarch, for the wardens and overseers. The writ ought not to have been directed to the wardens and overseers and the inhabitants generally. Stat. 56 G. 3. c. lv. repeals the former act as to the amount which shall be raised, but not as to the persons who shall meet to impose the rate. Those, properly, are the church wardens and overseers, and the six or more qualified inhabitants mentioned in stat. 22 & 23 Car. 2. c. 28. Stat. 56 G. 3. c. lv. s. 3. renders it lawful for the "wardens, overseers of the poor, and other inhabitants of the said parish, in vestry assembled," to make an assess-

(a) 2 Chitt. Rep. 251.

(b) 5 T. R. 538. See *Hardy v. Bern*, 5 T. R. 636.

(c) 2 Salk. 609.

(d) 3 B. & Ad. 651.

ment. The word "inhabitants" means the six or more authorised by the previous act; and the word "other" means inhabitants other than the wardens and overseers. The wardens and overseers would of course be inhabitants; and the mention of them in particular would be nugatory, if the word "inhabitants" included all. *Sandiman v. Breach* (a) and *Kitchen v. Shaw* (b) shew the extent to which general words in a statute are limited in construction by particular words preceding them; and here the construction of the words used by the legislature in the later act is the same as if the provisions of both acts had been contained in one. [He also cited, as to the meaning of "inhabitants," expressions in sects. 16, 17, and 18, of stat. 56 G. 3. c. lv., upon which no argument arises, capable of general application.] The wardens are not desirous to act unless they clearly possess the power. But the wardens, overseers, and those inhabitants who were in a minority when the rate was refused, contend (and are entitled to do so) that a rate is necessary, and ought to be made. [The *Attorney-General* here objected to *Hindmarch* being heard to argue against the return.] The wardens and overseers were favourably disposed to the making of a rate, but did not think themselves entitled to exclude the majority of the inhabitants from making such a defence as they should think fit. They, therefore, at the request of the attorney for the inhabitants, inserted the answer of the inhabitants to the writ: but the inhabitants have, since that, made a further and separate return, and now disavow the first. The wardens and overseers, then, ought not to be prevented from contesting the

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(a) 7 B. & C. 96.

(b) 6 A. & E. 729. S. C. 1 N. & P. 791.

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return made by the inhabitants, and those parts of the previous return which were inserted at their request. [Lord Denman C. J. You may leave that to the prosecutors. We do not think you can be heard against your own return].

Sir *J. Campbell*, Attorney-General, in support of the return by five inhabitants. It must be admitted that this case is distinguishable from *Rex v. The Churchwardens of St. Peter's, Thetford* (a), on the point of jurisdiction. But the mandamus does not limit the proposed rate to such an amount as may be necessary for payment of the salaries after the proper funds have been applied. The return shews that there are proper funds which are amply sufficient: but that was not necessary; for the mandamus ought to have shewn that they were not such sufficient funds. This it fails to do; and it does not even appear that enough may not remain out of a former rate. Such an objection may be well taken now; *Rex v. The Margate Pier Company* (b). That the profits of the rectory were a fund primarily liable, appears from the recital of stat. 22 & 23 Car. II. c. 28., which states that *James I.*, when he granted the rectory, enjoined the grantees, out of the revenue thereof, to find and maintain chaplains, a schoolmaster, and an usher, and to repair the church. The parties accepting such a grant became thereby bound (independently of the express covenant stated in the return, which in this case imposes a direct obligation) to perform the duty annexed to the grant, of paying the chaplains, schoolmaster and usher, on the principles laid down in *The*

(a) 5 T. R. 364.

(b) 3 B. & Ald. 220.

Mayor and Burgesses of Lyme Regis v. Henley (a).

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Stat. 22 & 23 Car. 2. c. 28. enabled the churchwardens and overseers to raise a rate for the purposes mentioned in the charter; but such rate was ancillary only to the other revenues. Stat. 56 G. 3. c. lv. does not make any change as to the applicability of the rate or other funds; and by its recital it recognises the existence of a "revenue of the said rectory, under the care and management of the said wardens," which it declares to be inadequate to the repairing the church and increasing the stipends (b). If any mandamus was requisite here, it should have been, not to make a rate, but to pay the monies then due, as in *Rex v. Carpenter* (c). The present not being a case in which the making of a rate is necessary for the public good, the instances in which "may" in a statute, has been construed "shall" do not apply.

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Sir F. Pollock, in reply. Stat. 56 G. 3. c. lv. s. 5. expressly enacts that the salaries shall be paid out of the rate, and the residue applied to the repairs of the church. And the prior statute, 22 & 23 Car. 2. c. 28., after reciting that the revenue from the rectory was insufficient, enacted that the inhabitants of *St. Saviour's* should be exonerated from the tithes of the rectory; that in consideration thereof a rate might be levied; and that the wardens should yearly pay the specified salaries to the chaplains, schoolmaster, and usher, which payments should be *in lieu* of all monies payable to them (not in aid of the funds appropriated to that purpose) under the letters patent of King *James*; and

(a) 3 B. & Ad. 77. Affirmed in *Dem. Proc.* 1 New Ca. 222.

(b) Antè, p. 934, note (a).

(c) 6 A. & E. 794.

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that the "residue of the monies so to be raised" should be applied to the repair of the church. The rate, then, is the primary fund, even if there were another which was adequate. As to the argument that the words in 56 G. 3. c. lv. s. 3., "wardens, overseers," and "other inhabitants," describe the same persons as the churchwardens, overseers, and six or more inhabitants, mentioned in stat. 22 & 23 Car. 2. c. 28., the cases cited have no application. Sect. 8 of stat. 56 G. 3. c. lv. speaks of "the said rates or assessments made by the wardens, overseers of the poor, and inhabitants in vestry of the said parish." [Lord Denman C. J. We do not think there is anything in that objection.] *Rex v. Carpenter (a)* does not apply. There the Court saw reason for not ordering a rate, and they granted a mandamus for payment only. Here the parish officers are compelled to pay the salaries by a rate, as the proper fund. (He then discussed the matters of fact stated in the mandamus and return.)

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court. After stating the object of the mandamus, and referring to the statutes, his Lordship said,

Two returns were made: and upon the argument it was conceded that, if the mandamus were properly directed, and if the rate spoken of in those acts were the primary fund for the payment of the salaries in question, then the writ was good and the returns insufficient, and that a peremptory mandamus, if necessary, ought to issue; the Attorney-General, for the inhabitants, properly con-

(a) 6 A. & E. 794.

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ceding that these salaries ought to be paid. We had no doubt upon the argument that the mandamus was properly directed: and upon consideration we are of opinion that the primary fund, to which the chaplains, schoolmaster, and usher are by law to look for their salaries, is a rate to be made annually under the provisions of 56 G. 3. c. lv. s. 3., without reference to the arrears, if any, of any former rate, or to any other fund in the hands of the churchwardens.

It is not necessary, for the purposes of this case, to inquire into the history of this parish earlier than the reign of *James I.*: for there is no evidence whatever on the face of the mandamus or return, or to be collected from the two statutes before mentioned, that there exist any funds appropriated at any earlier period to the purposes now in question. It appears that the monarch last named, by his letters patent, granted the rectory and parsonage impropriate to certain persons and their heirs in trust for the churchwardens and their successors, enjoining them *out of the revenue thereof* to find and maintain two preaching chaplains and a schoolmaster and usher, and to pay the two former 60*l.*, and the two latter 30*l.* per annum. The revenue of the rectory was therefore the original fund for the payment of these stipends: but in the 22 and 23 *Car. 2.* an act passed on account of the inability of providing for these stipends and the repairs of the parish church out of this fund. This act, therefore, exonerated the parishioners from all tithes, thereby in great measure drying up that original source, and *in consideration thereof* substituting a rate, which it empowered the wardens and overseers, calling together six inhabitants, with a certain qualification mentioned, to make and settle yearly for the purpose of raising a
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sum not exceeding 350*l*. It then directs the wardens to pay each of the chaplains the yearly sum of 100*l*., the schoolmaster 20*l*., and the usher 10*l*., which said several sums (it declares), so to be paid to them respectively as aforesaid, shall be in lieu of all monies respectively payable by virtue of the said letters patent. It is clear under this provision that, without reference to the tithes which were extinguished, or to any other source of income derivable under the letters patent of King *James*, the chaplains were thenceforth entitled to receive the sums specified primarily from a rate, which rate must be raised annually, because no arrears were to accumulate in the hands of the wardens, all the residue beyond the amount of the salaries being appropriated by the same clause to the repairs of the church.

In this state things continued till the 56 G. 3., when an act passed (c. lv.), which, after reciting the former enactment, and also that the sum allowed to be raised by it, *and the revenue of the rectory* under the management of the wardens, were inadequate to the repairing of the church and increasing the stipends paid to the chaplains, “ which are now inadequate and ought to be increased,” and that it was expedient to give power for raising additional rates for those purposes, repeals so much of the said act as respects the *amount* of the sum to be raised by rate.

It was contended, upon this recital, that it disclosed *a revenue of the rectory* still existing under the management of the wardens, though the tithes were extinct; and that the proceeds of this revenue ought to be accounted for and exhausted before any rate was raised. This recital is no doubt evidence of the existence of a revenue: but that seems to us immaterial; for the chaplains,

lains, schoolmaster, and usher have no claim upon it, whatever may be its amount. To what purposes it is to be applied beyond the repairs of the church, or what is its amount, we are not now called upon to examine: such an inquiry, if thought desirable, may be instituted elsewhere, and at another time, but is foreign to the present discussion. The third section then provides for an annual rate to be made by the wardens, overseers, and other inhabitants in vestry assembled, not exceeding 1s. in the pound; and, lastly, the fifth section enacts that the sums so assessed shall be thus applied: — that is to say, the wardens shall, by equal quarterly payments, pay, yearly, for ever, 300*l.* to each of the chaplains, 20*l.* to the schoolmaster, and 10*l.* to the usher, which sums shall be *in lieu* of all the monies to them respectively payable by virtue of the said letters patent, the residue to be applied to the church repairs and other purposes mentioned in the act.

All the same remarks apply to this provision which we have made on the correspondent provision in the statute of *Charles II.* It is obvious that the chaplains are to be paid wholly out of the rate; that they have been deprived of their claim upon any other source of revenue; and that from year to year, whatever money may be in the hands of the wardens, a rate is to be made for this purpose. As, therefore, they have not been paid, and as no rate has been made, it is the duty of the authorities named in the act, to whom the writ has been directed, to proceed forthwith to impose and collect the rate, and pay the salaries specified in the statute.

Upon these grounds we are of opinion that the mandamus

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damus is good, and that the returns made to it ought to be quashed.

Returns quashed. Peremptory mandamus awarded (a).

Sir *F. Pollock* in the ensuing *Easter* term obtained a rule calling upon the defendants (b) to shew cause why they should not pay to the prosecutors or their attorney their costs of the applications made for the writs of mandamus in this prosecution, the costs of and incident to the said writs, and the costs of this application; upon notice to be given to their attorney. In the same term, *Thursday, May 10th*,

Sir *J. Campbell*, Attorney-General, and *Perry*, shewed cause. First, this was a case of considerable difficulty, in which the Court, after argument on a return, took time for consideration. Under such circumstances the Court has never subjected defendants to costs, but has in several instances refused them: *Rex v. Lord of the Manor of Oundle* (c), *Rex v. The Commissioners of the Thames and Isis Navigation* (d). In *Rex v. Kirke* (e), and *Ex parte Davies* (g), where the prosecutors' costs were granted, the writ had been obeyed without making a return. Secondly, this is an application against the churchwardens and overseers and the "inhabitants" generally, and calls upon them, not to make a rate for

(a) See *Regina v. The Select Vestrymen of St. Margaret's, Leicester*, *Mich. T. 1838*.

(b) The rule was entitled, "The Queen against the Churchwardens and Overseers of the poor and Inhabitants of the parish of *St. Saviour, Southwark*."

(c) 1 *A. & E.* 299. note (c).

(d) 5 *A. & E.* 816.

(e) 5 *B. & Ad.* 1089.

(g) 5 *B. & Ad.* 1091. note (a).

paying,

paying, but to pay. The case, therefore, is not like *Rex v. Wix (a)*, where the mandamus called on the inhabitants to do something which they could do collectively. If this rule could be put in force, every individual, even the wardens who were friendly to the rate, and those inhabitants who voted for it, might be made answerable for the whole costs. But it is difficult to say what process could be resorted to for enforcing such a rule. And, if a single inhabitant could be required to pay, what remedy could he have for contribution? It may be hard that the chaplains, school-master, and usher should lose these costs; but perhaps the wardens may, under stat. 56 G. 3. c. lv., provide for them out of the church-rates, as a matter concerning the administration of the church affairs.

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Sir *F. Pollock*, contra. The mandamus had no relation to the church or its affairs. Much of the alleged difficulty in the case was caused by the defendants introducing the question of church-rate. In cases like the present (as where magistrates and other public servants are concerned), the Court looks rather at the claim which parties have to compensation, than at the difficulties which may possibly arise in enforcing it. If a right has been withheld, and parties thereby forced to apply for a mandamus, full justice is not done unless the applicants have their costs: and this applies peculiarly to the case of a contest between chaplains on a small salary, and a parish with ample funds. *Rex v. The Lord of the Manor of Oundle (b)* was the case of a mere private dispute. [*Patteson J.* My difficulty here is, to say who are the "defendants."] In reality, the

(a) 2 B. & Ad. 197.

(b) 1 A. & E. 283.

majority

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8. damus is good, and that the returns made to it be quashed.

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URRY
and
OUR'S,
LAWYERS.

Returns quashed. Peremptory
awarded (a).

Sir *F. Pollock* in the ensuing *Easter* rule calling upon the defendants (b) that they should not pay to the prosecutor their costs of the applications made mandamus in this prosecution, the to the said writs, and the costs of notice to be given to their attorney
Thursday, May 10th,

Sir *J. Campbell*, Attorney-General cause. First, this was a case in which the Court, after time for consideration. The Court has never subjected in several instances refused *Manor of Oundle* (c), *Thames and Isis Navigation* and *Ex parte Davies* were granted, the writ a return. Secondly, churchwardens and generally, and cases

(a) See *Regina v. Mich. T. 1838.*

(b) The rule was and Overseers of the

Southwark.

(c) 1 A. & E.

(d) 5 B. & A.

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wardens might pay the costs out of the rates. The rule (after some further discussion) was drawn up as follows.

“ It is ordered, that the defendants do pay to the prosecutors, or their attorney, their costs of the applications made for the two writs of mandamus issued in this prosecution, and also the costs of the said writs, and incident thereto, and the costs of this application; but that the churchwardens and overseers shall not be personally liable as such: and it is further ordered, that such several costs, if necessary, be taxed by the coroner and attorney of this Court.”

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The QUEEN *against* GUEST and Others.

Tuesday,
January 30th.

ON appeal against a rate made for the relief of the poor of the parish of *Merthyr Tydvil, Glamorganshire*, the following case was submitted to this Court by the sessions.

The appellants are the lessees and occupiers of the *Dowlais* iron works in the said parish, and, as connected with these works, they are also the lessees and occupiers of certain iron mines and coal mines. (The case then stated a point on which an objection was taken and the sessions made an amendment, and which was not referred to this Court). The appellants further objected to the amount of the rate upon their iron works, because several engines and other machinery used for working the iron mines mentioned in the rate, and also the several engines and other machinery used

In a rate laid upon buildings to which machinery is attached for the purpose of manufacture, the real property ought to be assessed according to its actual value as combined with the machinery, without considering whether the machinery be real or personal property, and liable, or not, to distress or seizure under a *fi. fa.*, or whether it would go to the heir or executor, or, at the expiration of a lease, to the landlord or tenant.

in

The sessions, with the amendments before mentioned, confirmed the rate, subject to the opinion of this Court.

The schedule referred to consisted of several columns. The first was headed "Landlords," and contained the names of the Marquis of *Bute*, and Messrs. *Guest, Lewis* and Co. The second was headed "Persons rated," and contained the names of Messrs. *Guest, Lewis* and Co. The third specified the "Property assessed," fixed, and moveable. Among the articles of the first description were blast furnaces, casting-houses, foundry, blast-engines, &c. Of the latter, blast-engines, furnaces, engines for rolling, "machinery" (described generally as such), &c. The fourth and fifth columns, headed "Schedule No. 1." and "Schedule No. 2.," stated the values of the two descriptions of property respectively.

The question for this Court was stated to be, whether the appellants are liable to be rated for the various properties referred to in the schedule No. 2. of the rate before set forth, or whether the rate is unequal in respect of the appellants being rated for them. If the Court should be of opinion that the properties charged in schedule 2. ought not to be charged, the rate was to be amended accordingly. The case was argued in *Hilary* term, 1837 (a).

Maule and *John Evans* in support of the order of sessions. The articles in schedule 2. were properly taken into account in the rate. On a question as to rating, if the article is practically connected with the real property, and forms a part of the means of enjoy-

(a) January 25th. Before Lord Denman C. J., *Williams* and *Cole-ridge* Js.

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ing it, the Court will not inquire with nicety whether it would fall within any of the cases which have arisen between heir and executor or landlord and tenant, or upon the subject of reputed ownership. The principle is that, where real property derives an increased annual value from a personal chattel annexed to it, the rate must be calculated on such increased value; 1 *Nol. P. L.* 81—84 (4th edit.), and *Rex v. St. Nicholas, Gloucester*, (a) and other cases cited in those pages. The present case is stronger than those, as to the connection of the machinery with the real property. In some of those instances the building and the annexed property were demised together; but, with reference to the poor law, that circumstance creates no distinction. It would be absurd to say that, in rating a house built for the purpose of working machinery, the overseers should assess the building as a shell, denuding it of that for the sake of which it exists. Nor can it reasonably be contended that, if the machinery be rateable, but there is a portion which might be subtracted without damage, a deduction should be made for so much.

Sir *J. Campbell*, Attorney General, *E. V. Williams*, and *Powell*, contra. The rate here is on buildings and machinery; but part of the machinery is personal property, and therefore ought not to be assessed in a parish where no other personal property is rated. The articles which, the appellants contend, have been improperly rated, are removable, and would go to the executor, not the heir, might be taken in execution, and would be the subject of trover. Messrs. *Guest* and Co. have not

(a) *Calcl.* 262. S. C. note (a) to *Rex v. Hogg*, 1 T. R. 723.

the freehold; they are lessees, and may remove these articles at the end of their term. In *Rex v. St. Nicholas, Gloucester* (a), the subject of rate was a "machine-house;" and it was assessed more highly on account of the increased value of the house, derived from a weighing machine. Here the appellants are rated for buildings, and for machinery, part of which is personal property. The light in which such property would be considered in an action between outgoing and incoming tenants, in a case of settlement, or on a question of reputed ownership, appears from *Davis v. Jones* (b), *Rex v. Otley* (c), *Horn v. Baker* (d), *Storer v. Hunter* (e), *Clark v. Crownshaw* (g), *Coombs v. Beaumont* (h). The law as to fixed machinery is summed up by Lord Lyndhurst C. B., in *Trappes v. Harter* (i). [Coleridge J. mentioned *Wansbrough v. Maton* (k)].

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The Court desired to see the original rate.

Cur. adv. vult.

The rate-book having been submitted to the Court in *Easter* term, 1837,

Lord DENMAN C. J. now delivered judgment as follows. This was an appeal against a rate on the ground that many articles of machinery employed by the appellant in his manufacture were personal property, and not subject to be rated. The sessions proposed nu-

(a) *Cald.* 262.

(b) 2 B. & Ald. 165.

(c) 1 B. & Ad. 161.

(d) 9 East, 215.

(e) 3 B. & C. 368.

(g) 3 B. & Ad. 804.

(h) 5 B. & Ad. 72.

(i) 2 Cro. & M. 153. F. C. 3 Tyr. 603.

(k) 4 A. & E. 884.

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merous questions to us (a); but we did not think their statement so full as it might have been, and we desired to see a copy of the rate, in the hope that we might be enabled, from the description there given, to specify the articles that ought to be included. In this we are disappointed, and can only direct that the rate should finally stand on the general principle which we have lately had occasion to lay down (b), that real property ought to be rated according to its actual value, as combined with the machinery attached to it, without considering whether the machinery be real or personal property, so as to be liable to distress or seizure under a fieri facias, or whether it would descend to the heir or executor, or belong, at the expiration of a lease, to landlord or tenant.

Rate to stand accordingly.

(a) A case, with many questions, had been sent up; but it was afterwards reduced to the form in which the present report gives it.

(b) See *Rex v. The Birmingham and Staffordshire Gas Light Company*, 6 A. & E. 634.

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January 30th.

HILL and RANDALL against Sir ROBERT SYDNEY,
Knight.

It is not necessary that an attorney should deliver a bill to another attorney, in pursuance of stat. 3 Jac. 1. c. 7. s. 1., before commencing an action against him for business done as his agent.

INDEBITATUS assumpsit for work of the plaintiffs as agent for the defendant, and materials provided for him by the plaintiffs, on his retainer, and fees due to the plaintiffs in respect thereof. Plea, non assumpsit. On the trial before Lord Denman C. J., at

In assumpsit by attorneys for business done in a particular court, the defence, under stat. 2 G. 2. c. 23., that one plaintiff was not admitted an attorney of such court, cannot be raised under the plea of non assumpsit.

the

the sittings in *Middlesex* after *Trinity* term, 1836, it appeared that the plaintiffs and defendants were attorneys, and that the defendant had retained the plaintiffs in a cause in Chancery, by the following letter addressed to them. "*Milligan v. Madkins*. Gentlemen, herewith you will receive instructions to oppose the charge of Mr. *Harrington*, carried into Master *Stratford's* office in the above creditor's suit. The warrant to proceed on it is for *Tuesday* at one o'clock. I shall attend the warrant on behalf of another defendant; but I thought it right that Mr. and Mrs. *Blight* and their children should appear by a distinct solicitor, as it might be said that their interests clash with Mrs. *Long's*. Of course you undertake this business as my agent on the usual terms. I am," &c.,

" *W. R. Sydney.*"

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against
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The plaintiffs sued for the work done, &c., under this retainer. No signed bill of fees, charges, and disbursements had been delivered. It was proved, in defence, that Mr. *Randall* was not upon the roll of solicitors in the Court of Chancery: the defendant's counsel, therefore, contended that he ought not to have been joined in the action. The Lord Chief Justice reserved the point, and; under his direction, a verdict was found for the plaintiffs. In *Michaelmas* term, 1836,

Mansel moved, according to the leave reserved, for a rule to shew cause why a nonsuit should not be entered. He also moved for a new trial, on the ground that no bill had been delivered. On this point, he contended that the plaintiffs were bound to deliver a bill by stat. 3 Jac. 1. c. 7. s. 1.; that stat. 12 G. 2. c. 13. s. 6.,

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which dispenses with the delivery of a bill for charges, &c., between one attorney or solicitor and another, refers expressly to stat. 2 G. 2. c. 23., leaving attorneys to such remedies against each other as they had before that act; but that it does not set aside the provisions of stat. 3 Jac. 1. c. 7. s. 1. He cited *Heming v. Wilton* (a).

The Court (b) granted a rule on the first point, but refused it on the second (c).

Platt and *Godson* shewed cause in the present term (d). First, the provisions of stat. 2 G. 2. c. 23., which prevent an attorney or solicitor from prosecuting any action in a Court of which he is not admitted, have, by stat. 12 G. 2. c. 13. s. 6., no operation upon bills of fees, charges, and disbursements due from one attorney or solicitor to another. Then, the former statute not applying, this action lies, one plaintiff being a solicitor of the Court of Chancery, and both having been contracted with; *Arden v. Tucker* (e). In *Brandon v. Hubbard* (g), which may be cited, there was no contract with the two plaintiffs. Here, *Randall*, who was not a solicitor of the Court, might conduct the business through *Hill*, who was: this appears from *Jones v. Jones* (h) and *Attorney-General v. Malin* (i); *Elkins v. Harding* (k) also bears on this point. By stat. 2 G. 2.

(a) *M. & M.* 529. *S. C.* 4 *Cor. & P.* 318.

(b) Lord Denman C. J., *Patteson, Williams, and Coleridge* Js.

(c) See *Sandys v. Hornsby*, 1 *M. & Rob.* 33.

(d) January 23d. Before Lord Denman C. J., *Littledale, Williams, and Coleridge* Js.

(e) 4 *B. & Ad.* 815. (g) 2 *Brod. & B.* 11.

(h) 5 *Dowl. P. C.* 474. (i) 2 *Tyr.* 512. *S. C.* 2 *Cro. & J.* 500.

(k) 1 *Tyr.* 274. *S. C.* 1 *Cro. & J.* 345.

c. 23. s. 10. an attorney, not of a particular Court, may carry on business there with the consent in writing of an attorney of such Court: and here, where the attorneys are partners, and jointly retained, such consent may be assumed. The defendants cannot deny, in this case, that there was a contract with them; they must contend that it was illegal; but that defence ought to have been specially pleaded: *Potts v. Sparrow (a)*.

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Mansel, contra. Stat. 2 G 2. c. 23. s. 24. prohibits an attorney, under a penalty, from practising in a court of which he is not admitted: therefore no legal contract could be made with *Randall* for the work in question, and *Arden v. Tucker (b)*, and similar cases, do not apply. *Hill* should have sued alone, as was done in the case of *Heming v. Wilton*, cited in *Arden v. Tucker (c)*. If no contract could arise here by implication of law, neither could one be created by the letter which was relied upon. As to stat. 2 G. 3. c. 23. s. 10., no written consent was shewn; if it existed, the plaintiffs ought to have proved it. And it appears, by *Vincent v. Holt (d)*, that that clause does not apply to the doing of business in the Court of Chancery by an attorney of another Court. The objection relied on here, that there has been a misjoinder of plaintiffs, may be taken on non assumpsit.

Cur. adv. vult.

LORD DENMAN C. J. now delivered the judgment of the Court. This was an action, by two plaintiffs, upon an attorney's and solicitor's bill, for business done in

(a) 3 Dowl. P. C. 630.

(b) 4 B. & Ad. 815.

(c) 4 B. & Ad. 817.

(d) 4 Taunt. 452.

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the Court of Chancery. One of the parties was not admitted a solicitor of that Court; and it was a question whether or not the action should have been brought by both. A question was also made, on moving for a rule, whether a bill ought not to have been delivered; but undoubtedly that was not requisite. And it is unnecessary to enter upon the other point; for the defence relied upon must clearly be pleaded, and cannot be taken advantage of on a plea in the present form. The rule must therefore be discharged.

Rule discharged (a).

(a) See *Lane v. Glenny*, ante, 83. *Shearwood v. Hay*, 5 A. & E. 383, and the cases there cited.

Tuesday,
January 30th.

The QUEEN against HIORNS.

At an election of councillors under stat. 5 & 6 W. 4. c. 76., if there be a disqualification rendering any person ineligible, notice of it should properly be given at the time of election.

Quere whether, in default of such notice, where the party is disqualified by being an assessor, and it appears that the electors must have known of his being so, votes given for him are thrown away, by the operation of stat. 7 W. 4. § 1 Vict. c. 78. s. 15.?

IN *Michaelmas* term last, a rule nisi was obtained for a quo warranto information against *Richard Hiorns* for claiming to be a town-councillor of the borough of *Warwick*.

The borough is divided into two wards, the ward of *St. Mary* and that of *St. Nicholas*. On November 1st, 1837, an election of four councillors took place for the ward of *St. Mary*. *Tibbitts* and three others had the largest numbers of votes, and were, in the first instance, declared to be elected: the next largest number of votes was given for *Hiorns*. On the following day a list of councillors elected was published, omitting the name of *Tibbitts*, and containing those of *Hiorns* and the three other persons above mentioned. *Hiorns* afterwards subscribed the declaration

declaration under stat. 5 & 6 W. 4. c. 76. s. 50. as a councillor. The reason for omitting *Tibbitts* was, that, at the time of the election, he held and exercised the office of assessor in the ward of *St. Nicholas*; but no objection on this account was taken at the time of the election, nor was any notice at that time given that he was ineligible, or that votes for him would be thrown away. The affidavits in opposition to the rule contained statements, shewing that *Tibbitts's* assumption and exercise of the office of assessor for *St. Nicholas* was notorious to the voters of *St. Mary's* ward.

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Sir *J. Campbell*, Attorney-General, Sir *W. W. Follett*, and *Austin*, now shewed cause. First, by stat. 5 & 6 W. 4. c. 76. s. 37., no burgess shall be eligible to be or be elected assessor of a borough, who shall be of the council. Sect. 43 clearly extends this provision to the assessors for wards where the borough is subdivided. And stat. 7 W. 4. & 1 Vict. c. 78. s. 15. directs that, "Whereas by the said act for regulating corporations it is provided, that no burgess shall be eligible to be or be elected an auditor or assessor who shall be of the council; be it also enacted, that no burgess shall be eligible to be elected a member of the council while holding the office of assessor." Secondly, the votes for *Tibbitts*, he being assessor at the time, were thrown away. If it had been formally announced that he was assessor, there could be no question that, after the notice, all votes for him would have been lost; *Rex v. Hawkins* (a). But it was notorious that he had been elected assessor, had made the declaration required by stat. 5 & 6 W. 4. c. 76. s. 50., had entered upon the office,

(a) 10 East, 211. Affirmed in Dom. Proc., *Hawkins v. Rex*, 2 Dow. 124.

and

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and was publicly exercising it at the time of the election: and, the ineligibility being created by express words of a statute, the inhabitants, knowing that the party was assessor, were bound to know that he was ineligible. Assuming (which appears to be the case) that stat. 7 *W. 4.* & 1 *Vict. c. 78. s. 15.* applies to ward as well as borough assessors, it may be inferred from the language, "no burgess shall be eligible to be elected a member of the council," that votes for him shall be lost, whether notice be given or not. And, on the election of councillors under stat. 5 & 6 *W. 4. c. 76.*, notice cannot be given as on ordinary elections, because no candidates are proposed, but the voting is by slips containing the names of those persons for whom the individual burgess votes.

Sir *F. Pollock*, with whom was *G. Hayes*, contra, was stopped by the Court.

LORD DENMAN C. J. I think that the information ought to issue. Undoubtedly notice of disqualification ought to be given; for, if that were not done, a party might be slipped in at the last moment, and be returned by a single vote on account of some objection to another candidate, not disclosed during the election. The observation of Mr. *Austin* on the effect of stat. 7 *W. 4.* & 1 *Vict. c. 76. s. 15.* is a novelty, which it will be proper to inquire into. The rule, therefore, must be absolute.

LITLEDALE, WILLIAMS, and COLERIDGE, Js. concurred.

Rule absolute (a).

(a) See *Regina v. The Councillors of Derby*, ante, 419.

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The QUEEN *against* The Mayor, Aldermen, Tuesday,
January 30th.
and Burgesses of LEEDS.

SIR W. W. FOLLETT moved for a rule to shew cause why a mandamus should not issue, directed to the mayor, aldermen, and burgesses of the borough of *Leeds*, commanding them to admit *Charles Wood* into the place and office of a councillor for the North ward of the said borough, in the place and stead of *Darnton Lupton*, late one of the said councillors. The facts of the case were as follows.

On *November 1st, 1836*, *William Brown* was elected a councillor for the North ward. On *June 5th 1837* he was declared bankrupt; but the council did not, from that time to *November 1st, 1837*, declare his office void or signify the same by notice, as directed by stat. 5 & 6 W. 4. c. 76. s. 52. On *November 1st, 1837*, the term of office of *Darnton Lupton*, another councillor, expired. On *October 28th, 1837*, the mayor of *Leeds*, with the consent of the aldermen and assessors of the several wards of the borough, published a notice (purporting to be given with such consent (a)) that the burgesses were required, on the 1st of *November* then

At an election of councillors for a ward, under stat. 5 & 6 W. 4. c. 76., there was one vacancy only, by rotation. A councillor had also become disqualified, under sect. 52, by bankruptcy; but the council had omitted to notify the vacancy. Two days before the commencement of the poll, the mayor, with the consent of the aldermen and assessors of all the wards, gave a notice (purporting to be published with such consent) of the polling-places, and stated also in such notice that the burgesses were required to elect two councillors

for the above ward. A majority of the burgesses gave votes for two candidates jointly, others voted for a third candidate singly.

Held that the single candidate, having the only available votes, was elected; and that the notice, being given without authority as to electing two councillors, did not prevent the double votes from being thrown away.

(a) It began, "I, *James Williamson*, Esquire, M. D., mayor of the borough of *Leeds* aforesaid, with the consent and approbation of the several aldermen and assessors of and for the twelve several and respective wards of the said borough, do hereby give notice," &c.

next,

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next, to elect two councillors for (among others) the North ward, and one for each of certain other wards. The rest of the notice consisted of regulations and directions as to the conduct of the election, and the places and manner of voting. There was no vacancy in the council, for the North ward, except as above stated. On the election for the North ward, 244 voting papers were given for two candidates, *Watson* and *Whitehead*, jointly, and 120 for *Charles Wood* alone (*a*). At the close of the poll it was contended that *Wood* was elected, because there had been only one vacancy, and the votes given for two persons jointly were void, and ought not to be reckoned (*b*). The aldermen and assessors declared *Watson* and *Whitehead* elected; but they declined accepting the office till it should appear by the decision of this Court that they were bound to do so. *Wood* demanded to be admitted a councillor, but was refused.

Sir *W. W. Follett*, now contended that, under these circumstances, *Wood* was duly elected, and the votes for *Watson* and *Whitehead* thrown away. Had *Brown* lost his title to office by an ordinary disqualification, he must have been removed by a quo warranto information: but he became disqualified, under sect. 52, by bankruptcy; in which case a particular course is pointed out for declaring the vacancy. If that had been done, a question might have arisen, under sect. 47, whether the office could properly have been filled up on the 1st of *November*; but it is not necessary here to go into that inquiry. It may be contended that the double votes

(a) Two votes were also given for *Watson* alone, and two for *Watson* and *Wood*.

(b) See stat. 5 & 6 *W.* 4. c. 76. s. 32.

ought

ought not to be considered as thrown away, because the notice published by the mayor stated that two councillors were to be elected for the North ward; but the only notices to be given before an election in a borough or ward are regulated by stat. 5 & 6 *W. 4. c. 76. ss. 33, 43*, and those sections do not authorise any such announcement. Being, therefore, irregularly made, it cannot sanction the votes.

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Sir *J. Campbell*, Attorney-General, and *Baines* shewed cause in the first instance, by consent. It is true that only one office was vacant, no proper notice having been given of the vacancy by *Brown's* disqualification. But the double votes were not thrown away, inasmuch as the two vacancies were declared by authority upon which the burgesses might reasonably depend. The notice was given by the mayor with the assent of all the aldermen and assessors of the several wards, and, therefore, of all the persons who were competent to notify an extraordinary vacancy under sect. 52, and all those whom the statute points out as the presiding and returning officers at a borough or a ward election, by sects. 32, 43, and 47. Not only, then, was no notice given to the burgesses that votes for two candidates would be thrown away, but they were informed, by authority which they might consider binding, that two vacancies existed. The election was a nullity; and the mandamus ought to be, not for admitting *Wood*, but for a new election, under stat. 7 *W. 4. & 1 Vict. c. 78. s. 26*.

Sir *W. W. Follett*, with whom was *Neville*, contra, was stopped by the Court.

Lord

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Lord DENMAN C. J. This case is clear of doubt. There was no authority to declare two vacancies. It is admitted that the 244 votes were improperly given; but it is said that, because there was a mistake, *Wood*, who had the only available votes, is not to be considered as elected. The mistake may have been a natural one: but, if 120 good votes are given for one candidate, and no receivable ones for another, what right have we to say that the first is not elected? The rule must be absolute.

LITLEDALE and WILLIAMS Js. concurred (a).

Rule absolute.

(a) *Coleridge J.* was in the bail court.

Tuesday,
January 30th.

The QUEEN *against* PHIPPEN and RICKETTS.

Where a town councillor, elected under stat. 5 & 6 W. 4. c. 76., has, during his term of office, been put out of the burgess roll by the overseers for alleged non-payment of rates, but continued to exercise the office, the Court will not, on affidavit of those facts, and of the alleged default, issue a mandamus to the mayor, or alderman of the ward, to proceed to a new election. The vacancy must be first ascertained by judgment on a quo warranto information.

MAULE, in *Michaelmas* term, 1837 (*November 25th*), obtained a rule calling upon *Robert Phippen* and *Richard Ricketts*, Esquires, to shew cause why a mandamus should not issue, directed to the said *R. Ricketts*, commanding him to proceed to the election of a town-councillor of the ward of *Bedminster*, in the city and county of *Bristol*, in the place and stead of the said *R. Phippen*.

By the affidavits in support of the rule, it appeared that *Phippen* was chosen a councillor of the above mentioned ward at the election in *December 1835*, and,

having

having the highest number of votes, was entitled to remain in office three years. That his name was omitted in the burgess list for 1837, 1838, because he had refused to pay a poor rate, due in *December* 1836, on his premises in the parish of *Bedminster*; and that he was, consequently, not upon the burgess list, nor, as was alleged, qualified to be a councillor, at the time when this application was made. That, on *November* 3d, 1837, a requisition was delivered to Mr. *Ricketts*, the alderman of *Bedminster* ward, stating that *Phippen* had not paid his rates, and that a vacancy had thereupon occurred in the council, and requiring *Ricketts* to proceed to the election of a new councillor, which he declined doing. *Phippen* paid the rate on *November* 8th.

In answer to the application, *Phippen* made affidavit that he still was a councillor; that he had refused payment of the rate because no duplicate of the assessment had been lodged in the vestry for the inspection of the rate-payers, according to the uniform practice of the parish since 1815: and that afterwards, when the duplicate was so deposited, he paid the rate. *Ricketts* deposed that he had not received from the council, town-clerk, or any other legal functionary of the borough, any official communication that a vacancy had occurred in the ward, or that *Phippen* had become incapable by reason of any disqualification mentioned in stat. 5 & 6 W. 4. c. 76., or stat. 7 W. 4. & 1 Vict. c. 78.

Sir *F. Pollock*, Sir *W. W. Follett*, and *Talbot* now shewed cause. The office is full de facto, and at most only voidable under stat. 5 & 6 W. 4. c. 76. ss. 9, 28.; therefore the proper course, if *Phippen* were disqualified, would

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would be a quo warranto: *Rex v. The Mayor, &c., of Oxford* (a), *Rex v. The Mayor, &c., of Winchester* (b). An alderman ought not to be required, by a mandamus, to decide questions of right which may prove extremely difficult. He should be called upon only when a vacancy has been declared by judgment of the Court on quo warranto; or in the particular cases pointed out by stat. 5 & 6 W. 4. c. 76. s. 52., namely, bankruptcy, taking the benefit of the insolvent debtors' acts, compounding with creditors, and absence; in which cases the statute itself declares that the party shall immediately become disqualified, and cease to hold office, and prescribes the mode of declaring it void. Sect. 53 shews that, in other cases, a party, though disqualified, still holds the office till legally removed. The power of awarding a mandamus, given by stat. 7 W. 4 & 1 Vict. c. 78, s. 26 (extending the provisions of stat. 11 G. 1. c. 4.), applies to cases where there has been no election, or the election becomes void; but not where a party is supposed to have forfeited his title from a cause subsequent to the election.

Maule, contra. Mr. *Phippen* has been adjudged by the proper authority, the persons who made out and revised the burgess roll, disqualified to be a burgess, and from that time, by stat. 5 & 6 W. 4. c. 76. s. 28., he was no longer qualified "to be elected or to be" a councillor. At common law this Court may issue a mandamus to fill up vacancies occasioned otherwise than by the want of an election on the charter-day; the

(a) 6 A. & E. 349. S. C. 1 N. & P. 474.

(b) Antè, 215. See *Regina v. The Councillors of Derby*, antè, 419.

statutory

statutory provisions referred to on the other side are not necessary for that purpose. If the party may retain his office till it is declared void by a judgment in quo warranto, the delay must be such that, in most instances, the year of office will have expired before he can be removed. *Rex v. The Mayor of Oxford* (a) shews that, where a councillor, before the end of his term of office, has been left out of the burgess list, though he has not been ousted by a quo warranto, another councillor may be elected (if the proceeding be bonâ fide) to supply his place. And, if the burgesses *may* elect in such a case, they are bound to do so. The present is one of the extraordinary vacancies contemplated by sect. 47. It cannot be contended that such vacancies occur only in the instances specified by sect. 52; it is evident that they must also be created by the disqualifications mentioned in sect. 28, when these attach during the term of office; as if, for instance, the officer were to take holy orders. There is not, in point of reason, any necessity for a quo warranto before a casual vacancy can be filled up. Sect. 52 shews that, in the instances there mentioned, such a proceeding was not thought necessary. And, under stat. 11 G. 1. c. 4., a mandamus lay to elect, without a previous judgment on quo warranto, in many cases where, according to the argument now urged for the defendants, a quo warranto would have been necessary. Several instances are collected in *Com. Dig. Mandamus* (A). The writ is there said to lie "To a mayor, to proceed to election, where there is a clause to hold over. *Rex v. Mayor of Helston*" (b). "To elect a mayor after a colourable

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(a) 6 A. & E. 349.

(b) 1 Stra. 555.

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election of one. *R. v. Mayor of Cambridge*" (a). "To go on to election of a mayor, tho' there is one *de facto*. *Case of Bossiney*" (b). "*Case of Aberystwith*" (c). "But the subsisting mayor *de facto* must always be made a party"; for which *Rex v. Bankes* (d) is cited. Here the alderman of the ward is made a party.

LORD DENMAN C. J. I take the regular practice to be that, where an office is full, there cannot be a new election without a quo warranto information to determine the title. There are, indeed, certain cases in which, by stat. 5 & 6 W. 4. c. 76. s. 52., express provision is made for declaring the office void without a quo warranto; but no such power is given under the circumstances alleged here. The alderman here cannot try whether the qualification still exists or not; he can only be informed on that subject by a certificate given according to sect. 52 in cases to which that section applies. The inconvenience suggested, that the term of office may expire before a quo warranto can be decided, has existed from the beginning of corporations. The rule must be discharged.

LITLEDALE J. Sect. 47 provides for the filling up of extraordinary vacancies; and sect. 52 points out certain cases in which an officer shall immediately become disqualified, and a vacancy be declared: but there a competent tribunal, the council, is appointed, which may discuss the avoidance, and ascertain it by evidence. In a case like the present there is no declaration of a vacancy; the fact is merely to be collected from affi-

(a) 4 Burr. 2008. (b) 2 Stra. 1003. (c) 2 Stra. 1157.
 (d) 1 W. Bl. 445. See the further report of the case, 1 W. Bl. 452.

davits;

davits; the alderman has no power to enquire whether there be a vacancy or not, and it is now referred to the Court to make that enquiry. The proceeding directed by sect. 47 is where the vacancy is fully established by judgment of ouster, or by due course of law under sect. 52. We cannot say here, according to the provisions of the act, that a vacancy has occurred.

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WILLIAMS J. The prosecutors' argument assumes that it would be a waste of time to drive them to a quo warranto, there being nothing to enquire into. But there may be very just grounds for enquiry. It may be alleged that the councillor has been corruptly omitted from the register. It does not follow, from the mere fact of his name not being enrolled, that there is a plain case of vacancy, in which no enquiry can be usefully instituted. Before granting a mandamus we ought to see that the officer is in a condition to act upon it.

Rule discharged (a).

(a) Coleridge J. was in the Bail Court.

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*Wednesday,
January 31st.*

REGULÆ GENERALES.

*Hilary Term, 1st Victoria, 1838.**In the Queen's Bench.*

WHEREAS by the practice of this court in all actions of ejectment it is necessary that the plea and consent rule should be filed at the chambers of one of the judges of the same court,

IT IS HEREBY ORDERED, That from and after the last day of this present term the said practice be discontinued, and in all such actions the plea, with the consent rule annexed thereto, be delivered in like manner as pleas in other actions, the defendant's appearance being first entered with the proper officer as heretofore.

(Signed)	DENMAN.	J. WILLIAMS.
	J. LITTLEDALE.	J. T. COLERIDGE.
	J. PATTESON.	

IT IS ORDERED, That the seventeenth article of the rule made in *Hilary* term, 2 *William* IV. (a), for regulating the practice of all the Courts of King's Bench, Common Pleas, and Exchequer of Pleas, be from henceforth annulled; and that in all cases special bail may be justified before a Judge at chambers, both in term and in vacation.

(a) *R. Hil.* 2 *W. 4.* 1, 17. 3 *B. & Ad.* 376.

It

IT IS ALSO ORDERED, That no rule for a special jury shall be granted on behalf of any Defendant, or Plaintiff in replevin, except on an affidavit, either stating that no notice of trial has been given, or, if it has been given, then stating the day for which such notice has been given; and in the latter case no such rule is to be granted, unless such application is made for it more than six days before that day. Provided that a Judge may on summons order a rule for a special jury to be drawn up at any time.

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IT IS FURTHER ORDERED, That henceforth every rule of Court delivered out in vacation shall be dated the day of the month and week on which the same is delivered out, but shall be entitled as of the term immediately preceding such vacation.

(Signed)	DENMAN.	J. PARKE.
	N. C. TINDAL.	J. B. BOSANQUET.
	ABINGER.	E. H. ALDERSON.
	J. A. PARK.	J. GURNEY.

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R. granted an annuity, charging it, by deed, on two ecclesiastical benefices holden by him, *S.* and *W.*, which he thereby demised on trusts to secure the annuity. He at the same time executed a warrant of attorney to the grantee, reciting the annuity deed, and stating that, for further securing the regular payment of the said annuity, he thereby desired and authorised certain attorneys, &c.; the rest of the instrument being in the common form of a warrant of attorney, to suffer judgment in an action of debt. The amount for which judgment was to be entered was twice the purchase-money of the annuity. There was no defeasance. Held, that the warrant of attorney was not void as charging the benefices contrary to stat. 15 *Eliz.* c. 20.

Under the authority of the above deed, the grantee sequestered the living of *W.* for arrears of the annuity; and afterwards, under the same authority, and to satisfy arrears of the annuity he obtained possession, by ejectment, of the living of *S.* The profits of *W.* were

were not sufficient to pay off the arrears for which the sequestration had issued; the profits of *S.* were sufficient, but arrears had accrued since the sequestration, and the profits of the two livings were insufficient to discharge all.

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When it may be made a rule of Court.

A submission to arbitration may be made a rule of Court under stat. 9 & 10 *W. 3. c. 15. s. 1.*, though the agreement to refer provides only that the award shall be made a rule of Court. *In re Story*, 602.

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Award bad for entering the verdict improperly with reference to the pleadings, 595. *Set-off*, I.

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Effect on previous recognizances to keep the peace, 583. *Recognizance*.

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- II. Of insolvent debtor, 869. 909. *Insolvent debtor*, II. *Statute*, XXXII. 1.
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- I. Effect of as to settlement by estate, 70. *Poor*, IX. 1.
 II. By insolvent debtor after the commencement of his imprisonment, 869. *Insolvent Debtor*, II.

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To borough officer, when not himself a borough officer, 739. *Statute*, XLIV. 9.

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I. When it lies.

By assignee of bond against obligor.

Declaration, in assumpsit, stated that defendant was indebted to plaintiff in a sum named, under and by virtue of a bond, and of an indenture and deed of assignment thereof; that, according to the condition of the bond, a certain part of that sum ought to have been paid on a certain day then past; and that, in consideration of the premises, and that plaintiff would accept payment of the whole on certain future days, and give time to the defendant in the meanwhile, the defendant promised to pay the sum then due on a day named, or in default of so doing, to give plaintiff a warrant of attorney for that sum; and that he would pay the remainder on the days named, and, in default of so doing, would execute a warrant of attorney for such remainder, or so much as might be due: averment, that plaintiff did forbear; breach, that defendant did not pay, nor execute a warrant of attorney.

On motion in arrest of judgment, held, that the declaration shewed a good consideration. *Morton v. Burn*, 19.

II. Consideration.

Forbearance by assignee of bond, 19. *Ante*, I.

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1. When not maintainable for a quarter's wages, by a servant improperly discharged in the middle of a quarter, 544. *Master and Servant*, II. 3.
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When it lies against administrator for proceeds of his intestate's tort, 426. *Executor*, II.

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5. What defence must be pleaded, 83. 956. *Attorney*, VII. 1, 2.
6. Replication de injuria in action on a bill of exchange, 161. *Replication*, II. 1.
7. What put in issue by replication traversing plea of payment and acceptance in satisfaction, 134. *Replication*, IV.

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1. On contract for sale of between 5000 and 6000 trees, 1. *Pleading*, XXIII. 2.
2. By assignee of bond against obligor, 19. *Ante*, I.
3. On promise by tenant to keep premises in repair, 136. *Landlord and Tenant*, V.
4. On a contract by landlord to send in furniture, 49. *Statute*, X.
5. Against bankrupt on new promise, 108. *Bankrupt*, I.

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ATTESTATION.

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I. Admission.

That attorney plaintiff was not admitted of the particular court is a defence that must be pleaded, 956. *Post*, VII. 1.

II. Readmission.

When necessary, 524. *Post*, III.

III. Certificate.

Effect of neglect to take it out.

An attorney who has once been admitted, and obtained his certificate, and practised, and has then omitted to take out his certificate, is precluded, by stat. 37 *G. 3. c. 90. ss. 26. 31.*, from resuming practice till he has been re-admitted.

So, if he has been re-admitted, and has, after such re-admission, omitted to take out his certificate.

Although he has not practised during such omission.

And although, after such omission, he take out his certificate, he cannot sue for business done after such taking out of the certificate, and before re-admission.

If he obtain security for payment for business so done, the Court will order it to be delivered up, and will set aside judgments and executions on warrants of attorney given for such business. *Wilton v. Chambers*, 524.

IV. Acts of.

1. Communications between the attorneys, when they do not dispense with term's notice of proceeding, 14. *Practice*, XIV.

2. Indorsement on letters to testator made by his deceased attorney, effect as rendering the letters admissible, 313. *Evidence*, XXVIII.

V. When personally liable.

For prosecuting criminal information from improper motives, 608. *Criminal Information*, II.

VI. His bill.

When the Court will order securities for payment to be delivered up, 524. *Ante*, III.

VII. Delivery of bill.

1. When not necessary.

It is not necessary that an attorney should deliver a bill to another attorney, in pursuance of stat. 5 *Jac. 1. c. 7. s. 1.*, before commencing an action against him for business done as his agent.

In assumpsit by attorneys for business done in a particular court, the defence, under stat. 2 *G. 2. c. 23.*, that one plaintiff was not admitted an attorney of such court, cannot be raised under the plea of non-assumpsit. *Hill v. Sydney*, 956.

2. Omission how available.

In an action on an attorney's bill, the defendant cannot, under the general issue, insist that a proper bill of costs was not delivered. *Lanc v. Glenny*, 83.

VIII. Agent.

Need not deliver bill, 956. *Ante*, VII.

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III. Render in discharge.

Under the rule of Court, *Hil. 2 W. 4.*

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Sanderson v. Brown, 261.

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Wrong sum indorsed on capias, 605.
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I. Rule by Judge sitting there, how far final.

A rule made by a Judge sitting in the Bail Court is not more liable to be reopened than a rule made in full Court.

And therefore a rule made by such Judge, unless under palpable misconception, cannot be re-opened after the term in which it was made; although the Judge, when applied to for his assent, says that he is content it should be reconsidered, if the Court think proper. *Todd v. Jeffery*, 519.

II. Discharge of rule how far final.

If a rule be obtained and discharged before the single Judge in the Bail Court, the full Court will not allow a rule for the same purpose to be discussed before them, though on affidavits discovering facts not previously stated.

Under rule *Hil.* 2 *W.* 4. I. 32., the Court will not order money deposited in lieu of bail to be repaid to a defendant who has been arrested, on the ground that the writ omits one christian name, and misdescribes another, if the plaintiff have used due diligence in inquiring for the proper name: but a rule obtained by defendant, for such repayment, was discharged without costs, it not appearing that the inquiries had come to defendant's knowledge. *Rosset v. Hartley*, 522. n.

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BANKER.

Stamp on banker's cheque, 114. *Statute*, XXIII. 1.

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I. New promise by.

Declaration alleged that, before the making of the promise &c., defendant was indebted to *J.* in 200*l.* for money had and received; that a commission of bankrupt had issued against defend-

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ant; that, in consideration of the premises, and that *J.* would prove for the 200*l.* under the commission, defendant promised *J.* to pay him that sum in a few months; that *J.* proved, but that defendant did not pay. A verdict was given on this count for *J.*'s representative.

Judgment arrested, on the ground that the count was founded on a promise without legal consideration; the Court refusing to presume that *J.*, in proving for money had and received, had waived a tort. *Brealey v. Andrew*, 108.

II. Actions by and against assignees.

Assignees defending as landlords, when not estopped by their tenant's acknowledgments from disputing a title acquired under a void assignment, 447.
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1. Apparent alteration, 444. *Post*, III.

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2. Want of stamp, 114. 116. *Statute*, XXIII. 1. *Evidence*, IV. 2.

II. Indorser.

When a competent witness for acceptor against subsequent indorsee, 917. *Post*, III. 1.

III. Evidence.

1. Who may prove payment.

In assumpsit on a bill of exchange, by indorsee against acceptor, issue being joined on a plea of payment, a prior indorsee is a competent witness for the defendant, though he acknowledges, on the voir dire, that he received the money from defendant to pay plaintiff the bill. *Reay v. Packwood*, 917.

2. Effect of admissions on the pleadings.

Declaration on a bill of exchange drawn 10th *December*, by indorsee against indorser; issue on the indorsement. The bill, when produced at the trial, to prove the indorsement, appeared to have been altered, in the date, from 15th *December* to 10th *December*. Held, that, on this issue, the indorsement might be read without previous proof that the alteration was made before the bill was negotiated. *Sibley v. Fisher*, 444.

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Replication de injuria to plea by acceptor, of payment by drawer, by giving other bills, 161. *Replication*, II. 1.

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- I. When not varied by parol agreement, 19. *Assumpsit*, I.
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When it cannot be given in evidence unless in writing, 86. *Statute*, XXXIII.

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When a ship is to be understood as having received pratique.

By charter-party, a vessel was to have

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ninety running days, and ten days of demurrage, to commence from her arrival at *W.*, being ready to unload and having received pratique. Declaration for breach of the charter-party stated that, although the vessel, on August 24th, was at *W.* ready to unload, and had received pratique, yet defendant did not, within ninety &c., commencing on her arrival at *W.* and being ready to unload and receiving pratique, unload and load the vessel, but wrongfully detained her beyond the running days and days of demurrage. Plea, that the vessel was not ready to unload, and did not receive pratique, for a long time after her arrival at *W.*, viz. for a time equal to that of the alleged wrongful detention: conclusion to the country. Issue thereon.

It appeared in evidence that the vessel was ready, and at liberty, to unload at *W.* on August 14, but had not gone through any form of receiving pratique, there being no quarantine establishment at *W.* nor any means of formally granting pratique.

Held, that the issue on the plaintiff's part, affirming that the vessel had received pratique, was sufficiently borne out by the proof; for that she must be taken to have received pratique when she was at *W.* ready and at liberty to unload. *Balley v. De Arroyave*, 919.

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CHURCH-RATE.

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- I. Election of.
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- II. His corporate capacity, 798. *Covenant*, I.
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- I. Of the peace, 756. *Statute*, XLIV. 10.
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 - Fee on transportation, 502. *Statute*, XXX.
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2. Jurisdiction of Court of Q. B., 139. *Statute*, XLIV. 7.
3. Who not an officer entitled, 750. 739. *Statute*, XLIV. 8, 9.
4. Under what circumstances it will be merely nominal, 139. *Statute*, XLIV. 7.
3. Mandamus to assess, refused, where it may be expected to be merely nominal, 139. *Statute*, XLIV. 7.

II. Under Turnpike Road Act.

1. To whom to be made.

By a turnpike road act, trustees were authorised to enter upon and take certain lands, and to pull down certain houses, buildings, &c., "making or tendering satisfaction to the owners or proprietors of all private lands, houses, buildings," &c., so taken, "for any loss or damage they may sustain thereby;" and it was also provided, that they should not be authorised to take other buildings, &c., without the consent "of the owners or proprietors thereof, or other persons interested therein." Held,

1. That compensation was to be made in the case of the premises taken under the former clause, not only to the owners of the fee-simple in the lands and buildings, but also to lessees of the same for terms of years.

2. That the trustees were not bound by the above clause to make or tender compensation before or at the time of entering upon or taking the lands, or pulling down the houses. *Lister v. Lobley*, 124.

2. At what time to be made, 124. *Ante*, 1.

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- II. Conditional promise to pay rent, 54. *Landlord and Tenant*, III.
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- 5. By reference to a different section in *consimili materia*, 909. *Statute*, XXXII. 1.
- 6. Literal, 698. *Pleading*, XIII.
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- 8. Restrictive effect of general words, 880. *Ecclesiastical Law*, VI.
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- 10. Strict, 423. *Poor*, XIII. 2.
- 11. Enlarged, 124. *Compensation*, II. 1.
- 12. Equitable, 167. *Contempt*.
- 13. Whether intended to meet similar mischief, 289. *Simony*, I.
- 14. Reddendo singula singulis, 124. *Compensation*, II. 1.
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- 18. Not restrained to matters referred to in preceding sections, 417. *Statute*, XLIV. 11.
- 19. Not merely directory, 605. *Writ*, II.
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17. "Parishes or places," 880. *Ecclesiastical Law*, VI.
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21. "Well knowing the premises," how construed in a plea, 40. *Insurance*, II.

22. "Ipso jure privatus," in canon against pluralities, 289. *Simony*, I.

CONTEMPT.

Defendant in Chancery, his right to be discharged out of custody for contempt.

Stat. 11 G. 4. & 1 W. 4. c. 86. s. 15. rule 5. provides that, if a defendant in Chancery, in actual custody under process of contempt for not appearing or not answering, shall not be sooner brought to the bar of the Court to answer his contempt, the plaintiff in Chancery, if the contempt be not sooner cleared, shall bring the defendant to the bar, &c., in thirty days from his being actually in custody or detained on such process; and, if the last of such thirty days be out of term, then in the first four days of the ensuing term; otherwise the sheriff, &c., shall discharge defendant out of custody.

In trespass for false imprisonment, defendant, a sheriff, justified under a writ in Chancery, by which he as sheriff was commanded to attach plaintiff to answer "as well touching a contempt" (not stating in what), as such other matters as, &c. Replication, that the writ was for a contempt in not answering; that plaintiff was in actual custody of defendant for thirty days under the writ, and was not brought to the bar of the Court in that time, nor was her contempt cleared, the last of the thirty days being in term; and that the plaintiff in Chancery did not bring plaintiff to the bar in the thirty days, though the contempt was not sooner cleared; and that it thereupon became defendant's duty, and he was requested, to discharge plaintiff, but refused.

On demurrer, Held (assuming the defendant to have been bound to discharge the plaintiff without any order of court): 1. That the action should have been in case. 2. That, even if

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the defendant had been a trespasser, he was not a trespasser ab initio, and the replication should have new assigned.

Semble, that no action lay, for want of notice to the defendant of the facts bringing the case within the rule. *Smith v. Egginton*, 167.

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- I. When not separable, 49. *Statute*, X.
- II. Distinctions between executed and executory, 492. *Poor*, X. 1.
- III. Premature dissolution of, 544. 557. *Master and Servant*, II. 2, 3.
- IV. Of hiring and service, how determined, 177. 544. 557. *Master and Servant*, II.
- V. For interest in lands, 49. *Statute*, X.
- VI. Pleading.
Effect of adding terms in the plea to the contract stated in the declaration, 557. *Master and Servant*, II. 2.

CONTUMACE CAPIENDO.

Writ when supported, notwithstanding defects in the sentence.

This Court will not set aside a writ de contumace capiendo on account of defects in the sentence on which it purports to be grounded, if there be a distinct and independent part of the sentence, as an award of costs, free from objection, which has been disobeyed.

Quære, whether an ecclesiastical court can sentence a defendant to perform penance at a minister's house? *Kington v. Hack*, 708.

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How far the whole is to be given in evidence, 627. *Evidence*, XXIV. 2.

CONVEYANCE.

- I. Effect as an estoppel, 157. *Estoppel*, VIII. 2.
- II. In form provided by statute for a case similar but not the same, 909. *Statute*.
- III. Fraudulent, 869. *Insolvent Debtor*.
- IV. By provisional assignee, to creditor assignee, form of, 909. *Statute XXXII*. 1.

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- I. For a trespass in pursuit of game, trial of appeal against, 27. *Sessions*, I. 5.
- II. For an assault, at petty sessions, 585. *Recognizance*.

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- I. Of affidavits, when not necessary to be obtained, 744. *Reg. Gen*.
- II. Of examinations taken under commission to examine witnesses, when not admissible, 185. *Evidence*, XIII.
- III. Stamp office, 223. *Libel*, IV.
- IV. Of a book, what presumptions it does not raise, 223. *Libel*, IV.

COPYHOLD.

- I. Covenant to surrender.
Effect of covenant to surrender, as to settlement by estate, 70. *Poor*, IX. 1.
- II. Surrender.
To use of will, when not necessary, 195. *Post*, IV. 2.
- III. Admittance.
 1. Of particular tenant, operates as admittance of reversioner, 195. *Post*, IV. 2.
 2. Of tenant for life, when spent on acquiring the reversion, 195. *Post*, IV. 2.
 3. Devise by devisee without admittance, 195. *Post*, IV. 2.
 4. Devise by heir before admittance, 195. *Post*, IV. 2.
- IV. Devise.
 1. Admittance and surrender, how far necessary, 195. *Post*, 2.
 2. What words carry only a life estate.
 1. Copyholder in fee devised to his wife *S.* freehold estates named in the will, together with personalty (making her sole executrix), to be freely possessed and enjoyed by her during her life, remainder over to children; and, if they died before *S.*, to be disposed of by *S.*'s will. By a codicil he bequeathed certain money to *S.* By a second codicil he devised and bequeathed to *S.* "all my copyhold in the hamlet of *H.*," "and likewise all monies lent out upon mortgage, bonds, or notes of hand." Held (the will and codicils being prior to stat. 7 W. 4. & 1

& 1 Vict. c. 26.), that *S.* took only a life estate in the copyhold.

2. *J.*, the deviser's heir at law, never was admitted, nor surrendered to the use of his will. Before stat. 55 G. 3. c. 192., he devised all his copyhold to *S.* in fee, and he died in *S.*'s lifetime, after that statute passed. *S.* was admitted, after the death of the first deviser, and after the making of *J.*'s will, but before his death, to hold according to the first will. Held, that *J.*'s devise passed the copyhold to *S.*, even assuming *J.* not to have been virtually admitted; but that, also, the admittance of *S.*, the tenant for life, operated as an admittance of *J.*, the reversioner.

3. *S.* was never admitted after *J.*'s death. She devised, after stat. 55 G. 3. c. 192., to her two customary heirs and *H.* in fee; and the three, after her death, were admitted each to an individual third, on producing the will. Held, that her life estate had merged in the fee devised to her by *J.*, and that the effect of her admittance was therefore spent, and her devise inoperative for want of admittance.

4. But that the two customary heirs had each a perfect legal estate in his third.

5. That *J.*'s heir at law had a good title to support ejectment for the remaining third. *Doe dem. Winder v. Lawes*, 195.

V. Customary heir.

His estate, 195. *Ante*, IV. 2.

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I. Municipal. *Municipal Corporation*.

II. Covenant to invest stock in corporate names of archdeacon, vicar, and churchwardens, effect of, 798. *Covenant*, 1.

* CORRESPONDENCE.

p. 313. *Evidence*, XXVIII.

COSTS.

I. Of action.

1. Payment of, when a condition on setting aside verdict in a cause taken as undefended, 11. *Practice*, XVII.
2. When not given on setting aside judgment against casual ejector,

there being no consent rule, 14. *Practice*, XIV.

3. Of first trial, where a new trial has been granted.

The rule *H. 2. W. 4. I. 64.*, that where a new trial is granted without any mention of costs in the rule, the costs of the first trial shall not be allowed to the successful party, though he succeed on the second, applies to issues in prohibition, even since stat. 1 W. 4. c. 21. s. 1 *Craven v. Sanderson*, 897. n.

II. On rules. *Practice*.

III. Setting off.

On old judgment, when they cannot be set off, 610. *Ejectment*, V.

IV. Of particular proceedings.

1. On refusing a criminal information, not awarded against attorney for prosecution when not personally a party to the rule, 608. *Criminal Information*, 11.
2. Payment of, when a condition precedent to staying proceedings in *Quo Warranto* under 7 W. 4. & 1 Vict. c. 78. s. 1., 430. 433. *Statute*, XLV. 1, 2.
3. Of mandamus, under 1 W. 4. c. 21. s. 6., 925. *Mandamus*, V.
4. Of collateral proceedings, 441. *Statute*, XLV. 4.

V. Attorney's bill of, 83. *Attorney*, VII. 2.

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I. When counsel must be instructed to state that a cause is defended, 11. *Practice*, XVII.

II. His statement of what took place at the trial, when the Court will not act upon, 116. *Evidence*, IV. 2.

III. Order in which they are heard. In aggravation or in mitigation in criminal cases, 593. *Practice*, XXVI.

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I. When a sufficient local description, 240. *Probate*.

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II. How

- II. How to be stated in jurat of affidavit,
190. *Criminal Information*, I. 1.

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- I. Of Q. B.
What judgment it can pronounce in error, 58. *Error*, II.
II. Bail Court. *Bail Court*.
III. Christian. *Ecclesiastical Court*.
IV. Consistory. *Ecclesiastical Court*.
V. Criminal.
Clerk's fees, 502. *Statute*, XXX.
VI. Ecclesiastical. *Ecclesiastical Court*.
VII. Foreign. *Foreign Court*.
VIII. Inferior. *Inferior Court*.
IX. Sessions. *Recognizance. Sessions*.
X. Of survey, 617. *Evidence*, XVIII. 2.
XI. Act of, how proved, 240. *Probate*.

COVENANT.

- I. Binding or void.
Where an impossibility is suggested.
Covenant to invest a sum in bank annuities, or other government stock, in the corporate names of the archdeacon of C., the vicar of W., and the churchwardens of W., the dividends to be held and received by the archdeacon, vicar, and churchwardens, for the time being, in trust for the support of a parish school for poor children, and in further trust for the distribution of coals, &c., among poor persons of the parish.
Held, on general demurrer to a declaration, that an action lay upon such covenant, no impossibility of performance appearing, inasmuch as the investment might at any rate be lawfully made in the corporate names of the present archdeacon, vicar, and churchwardens.
And this, although it was suggested in argument that, by the practice at the Bank, an investment would not be received there in the above corporate names.

(Quære, whether, if this had regularly appeared, it would have been an answer to the action?) *Tuffnell v. Robinson*, 788.

- II. To surrender copyholds.
Effect of, as to settlement by estate,
70. *Poor*, IX. 1.

COVERTURE.

Baron and Feme.

CREDIT.

Representation of character. When it must be in writing, 86. *Statute*, XXXIII.

CREDITOR.

- I. Execution, effect of his not appearing on interpleader rule, 580. *Statute*, XXXIX.
II. Assignment for benefit of creditors when void, 869. *Insolvent Debtor*, II.

CRIMINAL INFORMATION.

- I. When refused.
1. On account of the spirit displayed by the prosecutor.
A magistrate applying for a criminal information for slanderous words addressed to him in the execution of his duty, made an affidavit as to the subject of complaint, in which he stated the defendant to be a litigious and shuffling person, and related a former dispute between him and his son, involving circumstances discreditable to the defendant. The latter statement was made, professedly, in explanation of some words used by the defendant on the occasion when he spoke those more particularly complained of, but it did not bear upon the merits of the complaint.
Held, that the above statements were impertinent and censurable; but the Court did not, therefore, reject the affidavit; and it noticed the statements as shewing, unfavourably to the prosecutor, the spirit in which he had probably acted when the alleged offence took place.

If an affidavit purport to be sworn before a commissioner by A. B. of C. D., in the parish of E. and county of F., and the jurat state the affidavit to be sworn "at C. D. aforesaid:" Quære, whether the jurat be insufficient as not stating the county in which the oath was taken? *Rex v. Burn*, 190.

2. On account of misconduct of prosecutor.

The Court will not grant a criminal information for sending a challenge, if, in the course of the transactions out of which it arose, the prosecutor has himself sent a challenge to a third person connected with the party against whom he moves.

Although the prosecutor's challenge was sent into a foreign country, and did not

CRIMINAL INFORMATION, II., III.

not shew any intention to break the peace here. *Rex v. Larriu*, 277.

II. Costs.

On refusal.

The Court will not award costs to be paid by the attorney prosecuting a rule for a criminal information, where no circumstance appears making him, personally, a party to such rule; although his conduct may have been such that the Court would, otherwise, have entertained such an application against him.

And therefore the Court refused to make such order for costs where the information had been moved for against magistrates for refusing to examine witnesses on a charge of perjury, although the charge had been instituted before them by the attorney, as was alleged from improper motives and without authority from the supposed prosecutor, and had entirely failed, and although the magistrates had been served with a notice of motion for a criminal information, purporting (but not proved) to have been signed by the attorney; and an affidavit of the service was made by a person describing himself as clerk, in his support of the rule for an information. *Regina v. Thomas*, 608.

III. Liability of attorney for improperly prosecuting, 608. *Antd*, II.

CRIMINAL LAW.

I. Plea.

Practice on insane person refusing to plead, 536. *Insanity*, I.

II. Effect of erroneous judgment, 58. *Error*, II.

CRIMINAL PRACTICE.

Practice, XXII. to XXXI.

CROSS-EXAMINATION.

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CROWN PRACTICE.

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I. On breach of surety bond for performance of works, when only nominal, 143. *Principal and Surety*, I.

II. Evidence under replication of damages ultra, in assumpsit against outgoing tenant for non-repair, 136. *Landlord and Tenant*, V.

III. Mitigation of, 143. 223. *Libel*, IV. *Principal and Surety*.

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1. Fraudulently antedating, 858. *Poor*, VIII.

2. Post-dating a banker's cheque, 114. *Statute*, XXIII. 1.

DAYS.

From teste to return of writ, 281. *Mandamus*, VI. 3.

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Remedy for councillor de jure against councillor de facto, 215. *Municipal Corporation*, IV. 8.

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I. Of annuitant before testator, 636. *Devise*, I.

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DEBTOR, INSOLVENT.

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I. In pleading.

1. Facts essential to consideration not presumed, 108. *Bankrupt*, I.

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2. Quantity laid, when material for want of other averments, 1. *Pleading*, XXIII. 2.
3. For waste.
- What allegations do not extend to permissive waste, 540. *Waste*.
4. In replevin, 843. *Replevin*, I.
5. Demurrer to.
- When it contains a good count, 841. *Demurrer*, I.
- II. 1. By parties, 627. *Evidence*, XXIV. 2.
2. By party in receipt of rents, 235. *Evidence*, XXV. 1.
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- Of Ecclesiastical Court.
- When it will support a writ de contumace, 708. *Contumace Capiendo*.

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- I. Execution.
 1. Proof of, 783. *Evidence*, XVI.
 2. Effect of fraudulently antedating, 858. *Poor*, VIII.
- II. How far not necessary to demise of incorporeal hereditaments after the contract is executed, 492. *Poor*, X. 1.
- III. Recitals.
 1. When admissible as declarations, 235. *Evidence*, XXV. 1.
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- I. Notice that a cause is defended, 11. *Practice*, XVII.
- II. What must be especially pleaded. *General Issue*.

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- Bringing up for judgment, 593. *Practice*, XXVI.

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- I. When not excused so as to dispense with term's notice of proceeding, 14. *Practice*, XIV.
- II. In taking advantage of statutory stay of proceedings on payment of costs, 441. *Statute*, XLV. 4.

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- Of attorney's bill, 83. 956. *Attorney*, VII.

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- I. See *Landlord and Tenant*.
- II. Distinction between executed and executory, 492. *Poor*, X. 1.
- III. Of site of new market, without a demise of the franchise, effect of, 95. *Market*, I.

DEMURRER.

- I. When too large.

If a declaration contains a good and a bad count, and the whole is demurred to, the plaintiff is entitled to judgment generally, and the defendant will be put to his writ of error as to the bad count.

A count in assumpsit stating that defendant, on &c., was indebted to plaintiff for goods sold and delivered (without saying when) is not bad under the new rules of pleading.

Semble, by Lord Denman C. J., that a count in assumpsit, charging that defendant, on &c., was indebted to plaintiff on an account stated (without saying when) is good on special demurrer. *Webb v. Baker*, 841.
- II. Its effect as a pleading over, 843. *Replevin*, I.

DENIAL.

- What is not a plea in, 161. *Replication*, II. 1.

DEPOSIT.

- I. In lieu of bail, 522. *Bail Court*, II.
- II. Of newspaper, what it proves, 223. *Libel*, IV.

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- Customs of mines, 565. *Office*, I.

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DETENTION.

When it does not render sheriff a trespasser ab initio, 167. *Contempt*.

DETERMINATION.

Of contract of hiring, by notice, 177.
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DEVISE.

I. What words give the fee.

When the purposes of the trusts cause the trustees to take a fee simple.

Testator devised personalty to trustees, to pay debts, and invest the surplus, and to receive the interest, and pay it to his wife during her life and widowhood, and afterwards to apply the interest, or a sufficient part, to the maintenance of his daughter *I.*, until she should attain the age of twenty-five, and then to pay and assign the principal and unapplied interest to her; but, in case she should happen to die before attaining that age, leaving lawful issue, then in trust to pay the same to such issue, share and share alike, if more than one, as soon as they should respectively attain twenty-one, and to pay the interest towards their maintenance in the meantime; but, in case *I.* should happen to die under twenty-five, and without leaving lawful issue, testator bequeathed the whole surplus of the personalty to *W.* and *D.*, share and share alike.

By the same will, he devised to *D.* an annuity of 200*l.* for life, charged on his land, to be paid by the above-mentioned trustees; and he devised to the same trustees (one of whom was *W.*), and the survivors and survivor, and the heirs of the survivor, all his lands, charged with the annuity, and with so much of his debts, legacies, and funeral expenses, as the residue of the personalty would not extend to, in trust to receive the rents, issues, &c., and apply them to the use of testator's wife, during her life and widowhood, and afterwards to apply the rents, &c., to the maintenance of *I.* until she should attain the age of twenty-five, and afterwards in trust for *I.* and her heirs; but, in case it should happen that *I.* died without leaving lawful issue, then testator devised the lands to *W.* and *D.* in

fee, as tenants in common. The will also empowered the trustees, in order to pay debts, &c., in case the residue of the personalty should be insufficient, to sell any part of the lands, and to grant, alien, and convey the same lands, or any part thereof, in fee simple.

The testator's wife died in his lifetime; *I.* survived the testator, and attained the age of twenty-one, but died under twenty-five, leaving no issue.

The personalty not being sufficient to pay the debts, the trustees sold part of the land.

Held, 1. That the trustees took a legal fee simple in all the land, such estate being requisite for the purposes of the trusts.

2. That, on the testator's death, *I.* took a vested equitable estate tail, and *W.* and *D.* took equitable remainders. And, therefore,

3. That *I.*, by suffering a recovery in which the trustees did not join, created no legal estate; but that the equitable remainders of *W.* and *D.* were barred. *Doe dem. Cadogan v. Ewart*, 636.

II. What words give a vested equitable estate tail, 636. *Ante*, I.

III. What words carried only a life estate. "All my copyhold in *H.*" 195. *Copyhold*, IV. 2.

IV. Executory devise.

When too remote after the words "die without leaving issue," 636. *Ante*, I.

V. Construction.

1. Effect of giving estate to devisee at age of twenty-five, 636. *Ante*, I.

2. "Die without leaving issue," 636. *Ante*, I.

3. Effect of giving trustees power to sell, 636. *Ante*, I.

VI. Of copyholds, 195. *Copyhold*, IV. 2.

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I. Of mandamus, 925. *Mandamus*, V.

II. Of commission to examine witnesses, 185. *Evidence*, XIII.

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I. Out of custody.

1. On writ of error after conviction of felony, 58. 60. *Error*.

2. For contempt, 167. *Contempt*.

II. Of bail by render, 261. *Bail*, III.

DISCONTINUANCE.

Of proceedings in Quo Warranto under 7 W. 4., and 1 V. c. 78. ss. 1, 2., 430. 433, 441. *Statute*, XLV.

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Plea when bad, as traversing several material facts, 1. *Pleading*, XXIII. 2.

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I. Of marriage, 761. *Poor*, XI. 2.

II. Of contract, 177. 544. 557. *Master and Servant*, II.

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I. For rent, 54. *Landlord and Tenant*, III.

II. On tenant holding over, when not justifiable, 110. *Landlord and Tenant*, VI. 2.

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Of plea pleaded to several counts, 595. *Set-off*, I.

DOCUMENTARY EVIDENCE.

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Stamp on, 114. *Statute*, XXIII. 1.

DUCHY OF LANCASTER.

Survey produced from Duchy office, 617. *Evidence*, XVIII. 2.

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In ascertaining defendant's name, 522. *Bail Court*, II.

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Variance between duplicate orders of maintenance, 807. *Poor*, XVII. 2.

DUPLICITY.

In pleading. *Pleading*, VIII.

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pp. 209. 827. *Perambulation*, I. *Sheriff*, II.

ECCLESIASTICAL COURT.

I. Judicial committee of Privy Council, 713. *Post*, IX. 5.

II. Jurisdiction and powers.

1. What provisions in an act of parliament cause a matter therein to be not of ecclesiastical jurisdiction, 925. *Mandamus*, V.

2. Power to construe an act of parliament.

The spiritual courts have power to construe a statute, the effect of which comes incidentally before them in the course of a proceeding where they have jurisdiction. Therefore, where, on objection taken to a declaration in prohibition, on general demurrer, it appeared only that, in a proceeding to enforce a church rate, the Spiritual Court would have to determine the effect of an act of parliament, this Court gave judgment for the defendant in prohibition, on the ground that the Spiritual Court did not appear to have done any thing as yet, and it was not to be presumed that they would construe the statute erroneously.

And, under such circumstances, this Court would not give leave to amend for the purpose of raising the question here on the effect of the statute. *Hall v. Maule*, 721.

III. Decree.

Dissolving incestuous marriage: effect in evidence in answer to a former order of removal of other parties grounded on the marriage, 761. *Poor*, XI. 2.

IV. Sentence.

Qu, as to sentence to perform penance at the minister's house, 708. *Contumace Capiendo*.

V. Admonition to take out schedule of penance, 708. *Contumace Capiendo*.

VI. Execution.

Writ *De Contumace*, when not set aside for defects in sentence, 708. *Contumace Capiendo*.

VII. Appeal.

Whether appellant may move for prohibition, 713. *Post*, IX. 5.

VIII. Probate, 240. *Probate*.

IX. Prohibition.

1. Who may move for, 713. *Post*, 3.
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2. At what stage court will interfere by, 721. *Ante*, II. 2.

3. When refused, jurisdiction being admitted.

In a suit by *C.* and *H.*, churchwardens, against *F.*, for non-payment of church rate, a libel, answer, and reply were put in, and certain articles were exhibited by the churchwardens with, and in support of, the reply. The articles were rejected in the Consistory Court, but, on appeal to the Arches Court, they were admitted. *F.* then appealed to the Privy Council, and his appeal was referred to the Judicial Committee. While the appeal was depending, but before any proceeding had been taken, in that court, *F.* moved for a prohibition, on the ground that the rate was bad, and appeared to be so from facts stated on the pleadings.

Held, that a prohibition could not be granted on this ground, the cause being before a court, the jurisdiction of which was not denied, no erroneous proceeding having been taken there, and this Court refusing to presume that the Judicial Committee would act incorrectly.

Per *Littledale* and *Coleridge* Js. If the motion had been well grounded, no objection would have arisen from the fact that the party moving was himself the appellant. *Chesterton v. Farlar*, 715.

4. Amendment in pleadings when refused, 721. *Ante*, II. 2.

ECCLESIASTICAL LAW.

I. Advowson.

1. Sale of, after avoidance by accepting a benefice, 289. *Simony*, I.

2. Next presentation, when a chose in action severed from the advowson, 289. *Simony*, I.

II. Avoidance of living.

By accepting a benefice, 289. *Simony*, I.

III. Charge of annuity on benefices, 898. *Annuity*, I.

IV. Canons.

Of council of Lateran against pluralities, 289. *Simony*, I.

V. Pluralities.

Where first living under 8*l.* in King's book, 289. *Simony*, I.

VI. Liability to repair churches.

An inhabitant of the parish of *W.* was libelled for non-payment of rates imposed for the repair of the parish church, and of certain chapels built within the parish, under stats. 58 *G. 3. c. 45.*, 59 *G. 3. c. 134.*, and 3 *G. 4. c. 72.* He declared in prohibition, alleging that the rate was improperly laid on a part of the parish only, excluding the township of *H.* Plea, that the chapels were built in aid of the parish church; that there has immemorially been a chapel in *H.*, at which the inhabitants of *H.* have received all divine rites and services; that the costs of repairing the chapel have been immemorially defrayed by the inhabitants of *H.* and no others; that from time, &c., no rate for repairing the parish church has been laid on any person in *H.*; and that the inhabitants of *H.* have from time, &c., been exempt from contributing to the repairs of the parish church. A verdict having been given for the defendants on a traverse upon this plea,

Held, on motion for judgment non obstante veredicto, that the Court must, after verdict, intend the chapel to have been coeval with the church (although that fact was not pleaded): And that, the chapel and church being coeval, and the inhabitants having always been exempt from the church rate, no rate for repairing the church could now be imposed upon them.

Also that, under stat. 3 *G. 4. c. 72. s. 20.*, which directs that chapels built under the two first-mentioned acts or that act shall be repaired by the parishes or places at large to which they belong, the new chapels mentioned in the above pleadings were repairable by the district which repaired the church; viz. the parish of *W.* minus the township of *H.* *Craven v. Sanderson*, 880.

VII. Church building acts, 880. *Ante*, VI.

VIII. Church rate.

Rate in the nature of, when not a matter of ecclesiastical jurisdiction, 925. *Mandamus*, V.

EJECTMENT.

I. Practice in.

1. Proceedings before appearance, 14. *Practice*, XIV.

2. Effect

2. Effect of judge's order for particulars made before appearance, 14. *Practice*, XIV.
5. Effect of not delivering particulars within a year, 14. *Practice*, XIV.
4. Term's notice to proceed, when necessary, 14. *Practice*, XIV.
5. Costs against plaintiff not given before consent rule, 14. *Practice*, XIV.
6. Delivery of plea and consent rule, 972. *Reg. Gen.*
7. Judgment against casual ejector, when set aside without costs, 14. *Practice*, XIV.

II. Premises to be recovered.
County, when a sufficient local description, 240. *Probate*.

III. Legal estate, 235. *Evidence*, XXV. 1.

IV. Estoppel.

1. When defendant claiming under vendor is estopped from setting up the title of a third party, as against the vendee, 157. *Estoppel*, VIII. 2.
2. Party defending as landlord, by what estoppels he is affected, 447. *Post*, 5.
3. Estoppel from disputing the landlord's title: how the acts of the parties may be explained.

A. demised a house and lands to *B.*, and afterwards, being embarrassed, assigned the premises, and all his personal estate, to *C.* *A.* told *B.* that he had assigned the premises, and requested him to give *C.* an acknowledgment; whereupon *B.* gave *C.* a shilling, and subsequently agreed with *C.* to give up possession to him of the house and lands respectively at the usual times, receiving an allowance for his improvements. Afterwards, and while the premises were still in *B.*'s occupation, *A.* became bankrupt, and *C.* brought ejectment. The assignees under *A.*'s commission defended as landlords, and contended that the assignment to *C.* was invalid, *A.* having become bankrupt when he made it.

Held, that the acknowledgments above mentioned did not estop *B.*, or the assignees as representing him, from contesting *C.*'s title on the above ground; such acknowledgments having been made in consequence of *A.*'s representations, in which he suppressed the facts rendering the assignment invalid. *Doe dem. Plevin v. Brown*, 447.

ENTRIES.

V. Writ of possession.

When and how far necessary.

Lessor of plaintiff in ejectment recovered against defendant, and taxed the costs. A writ of possession was taken out and delivered to the sheriff in *Nov.* 1834, but not executed or returned. A second writ of possession was afterwards taken out, in *June* 1837, which was shortly after set aside for irregularity, with costs, no scire facias having issued on the judgment. Held, that the lessor of the plaintiff, who was mortgagee of the premises, and had recovered in that right, and entered, could not, on those grounds, retain the premises independently of the writ of possession; and the Court ordered him to restore possession.

Held, also, that he could not set off the costs on the judgment against the costs on the setting aside of the writ. *Doe dem. Stephens v. Lloyd*, 610.

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I. Under municipal corporation acts, 215. 430. 433. 960. 963. *Municipal Corporation*, IV. 8. *Statute*, XLIV. 2, 3. XLV. 1, 2.

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ERROR.

In criminal cases.

I. Effect of nonjoinder in.

When error is brought on a judgment for felony, and the crown does not join in error, the defendants will be discharged. *Rex v. Howes*, 60. n.

II. What judgment is to be pronounced.

Where an erroneous judgment is given by an inferior court, on a valid indictment (as by passing sentence of transportation in a case punishable only with death), and the defendants bring error, this Court can neither pass the proper sentence, nor send back the record to the Court below in order that they may do so; but the judgment must be reversed and the defendants discharged. *Rex v. Bourne*, 58.

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I. Act of mutual agent, when not, 29. *Shipping*, I. 1.II. Bill of lading when not, as between consignor and shipowner, 29. *Shipping*, I. 1.III. Whether appellant may move for a prohibition, 713. *Ecclesiastical Court*, IX. 3.IV. Order of removal confirmed on appeal, 761. *Poor*, XI. 2.V. By discharge of former order of removal, 471. *Poor*, XII. 2.VI. By signature of notice of appeal, 471. *Poor*, XII. 2.VII. Of party pleading double from objecting to the duplicity of the replication de injuria, 161. *Replication*, II. 1.

VIII. From disputing title of person under whom, &c.

1. What mistakes may be explained, 447. *Ejectment*, IV. 3.

2. Of persons claiming under vendor.

S., the husband of *A.*, being in possession of lands, made a conveyance of them in fee; but it was agreed, verbally, between him and the purchaser, that, during the joint lives of the purchaser and *S.*, the possession of *S.* should not be disturbed. The purchaser died; and *S.* received notice to quit. He also died, the notice having expired. *A.*, the widow, retained possession. On ejectment brought against her by the purchaser's representatives,

Held, that she could not set up against them the title of a party to whom her husband, before the above-mentioned conveyance, had given a mortgage for 1000 years. *Doe dem. Leeming v. Skirrow*, 157.

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1. On appeal against order of removal, respondent not put to prove his settlement unless disputed in grounds of appeal, 492. *Poor*, X. 1.
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1. For want of stamp, 114. 116. *Statute*, XXIII. 1. *Post*, IV. 2.
2. Under Poor Law Amendment Act, 423. *Poor*, XIII. 2.
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III. Interest of Witness.

In an action between indorsee and acceptor, a prior indorsee employed to pay the amount may prove the payment, 917. *Bills of Exchange*, III. 1.

IV. Objection to, when to be taken.

1. Where the defect requires extrinsic evidence to shew it, 114. *Statute*, XXIII. 1.
2. Where the omission was accidental.
A written paper being offered in evidence by plaintiff, on a trial, defendant's counsel desired to see it; before it was handed to him, it was laid before the Judge, and afterwards, while the counsel's attention was accidentally diverted, and before the paper was handed to him, it was read in evidence. The Judge at Nisi Prius held that the counsel could not afterwards object to the want of a stamp, and the plaintiff having obtained a verdict, this Court refused to grant a rule nisi for a new trial, on counsel's statement of the above facts. *Foss v. Wagner*, 116.

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1. When not sufficient to make attorney prosecuting criminal information from improper motives liable to costs, 608. *Criminal Information*, II.
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2. Of state of repair at the time of demise, on replication of damages ultra, 136. *Landlord and Tenant*, V.
3. On an issue whether a ship was ready to unload having received pratique at a port where there were no means of formally granting pratique, 919. *Charter-Party*.
4. In reduction of damages where admissible under plea of non est factum to debt on surety bond, 143. *Principal and Surety*, I.
5. What cannot be given in evidence under the general issue, 83. 956. *Attorney*, VII.

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1. Of authority of Court of Survey to take survey, 617. *Post*, XVIII. 2.
2. Presumption omnia rite esse acta.
Quare, Where the act to be presumed is not in the ordinary course of business, 909. *Statute*, XXXII. 1.

X. Presumption when refused.

1. Of defendant's knowledge of plaintiff having published a newspaper, from production of Stamp Office copy, 223. *Libel*, IV.
2. Of general publication of a newspaper from production of Stamp Office copy, 223. *Libel*, IV.
3. Of publication of other copies of a printed book, 223. *Libel*, IV.

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XIII. Documentary, generally.

1. Apparent alteration, 444. *Bills of Exchange*, III. 2.
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3. Proper custody of letters, 313. *Post*, XXVIII.
4. Rule as to objection to a document after it has once been read, 114. 116. *Ante*, IV. 2. *Statute*, XXIII. 1.

XIV. Official copies.

Of examinations taken by a foreign court pursuant to a commission to examine witnesses.

A commission to examine witnesses was directed to the Court of Commerce at

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at *Hamburg*; and it was ordered by the commission that the examinations should be taken, and that the same should be sent to the Court of King's Bench to be filed of record in the office of the clerk of the rules. The Court of Commerce took the examinations by an act of their own; copies of the minutes of that act, certified by their assistant actuary (whom they had added to the commission for the purpose of keeping the minutes), were transmitted under the seal of the Court of Commerce, with the commission; and that Court certified, by indorsement on the commission, the execution thereof, by referring to the annexed extract of their minutes. Held, that these copies could not be read in evidence, the commission requiring that the examinations actually taken should be transmitted.

[The order for issuing the commission was drawn up under a mistake; the intention of this Court having been to direct the commission, not to the court, but to the individuals composing it.] *Clay v. Stephenson*, 185.

XV. Copies made evidence by statute, and other copies.

1. Newspapers. To what cases the statutory provisions are applicable, 223. *Libel*, IV.
2. Printed copy corresponding with destroyed libel, 233. *Libel*, I. 1.

XVI. Deeds.

Proof by subscribing witness, when not dispensed with.

In an action of covenant for not indemnifying plaintiff against liabilities incurred by him as trustee under a former deed, to which plaintiff and defendant were parties, the declaration set out the deed of indemnity, which recited, in part, the deed of trust. Plea, that defendant did not become liable by reason of his having been trustee under the trust deed, nor was the loss complained of a consequence of the trusts, or of plaintiff's having been such trustee as aforesaid. Issue thereon.

Held, that neither the form of the issue nor the recital in the deed of indemnity entitled the plaintiff to put in the deed of trust without proof, by the subscribing witness, of its execution.

The recital, in a deed, of a former deed between the same parties, proves

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(as between the parties) so much of the former deed as is recited, but no more. *Gillet v. Abbott*, 785.

XVII. Recitals.

1. When admissible as declarations, 235. *Post*, XXVI. 1.
2. Admit only so much of a deed as is recited, 783. *Antè*, XVI.
3. Conveyance by provisional assignee, purporting to be by order of the Insolvent Debtors' Court, whether it is evidence of such order, to go to the jury, 909. *Statute*, XXXII. 1.

XVIII. Particular documents.

1. Affidavits used by the opposite party on a former occasion, 454. *Post*, XXV. 1.
2. Ancient surveys. What authority must be shewn.

On a question as to the boundary of a manor, formerly, but no longer, part of the duchy of *Lancaster*, a document of the time of *Elizabeth* (when the manor belonged to the duchy) was offered in evidence. It was produced from the duchy office, and purported to be a survey of the manor, taken by *J. W.*, deputy of the surveyor-general of the duchy, by authority of letters of deputation to *J. W.*, by the oaths and presentment of such of the tenants of the manor whose names were subscribed. The names of twenty persons followed, described as "jurors at the Court of Survey," and it was added, that they, being examined, did present, &c. Then came a statement of the boundaries, a list of tenants and rents, and a presentment of the demesnes, of customs, of injuries suggested, and of some other particulars. No authority for taking the survey was proved, except as above-mentioned.

Held, that the document was not admissible, either as a survey appearing to be taken by the proper officer, agreeably to the statute *Extenta Manerii*, 4 *Ed. 1. stat. 1.*, or as furnishing evidence of reputation. *Evans v. Taylor*, 617.

3. Depositions. Under commission to examine witnesses, 185. *Antè*, XIII.
4. Entries in parish books, 409. *Perambulation*, 1.
5. Indorsement by Court on granting probate, 240. *Probate*.
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1. Representation of character when it is the only proof of fraud, rejected, 86. *Statute*, XXXIII.
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1. Former order of removal confirmed on a appeal, how far not conclusive on a new state of facts, and as to a person not named therein, 761. *Poor*, XI. 2.
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4. Bill of lading when not conclusive, 29. *Shipping*, I. 1.
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1. Only so much of a deed as is stated in the pleading replied to, 783. *Ante*, XVI.
2. Facts not put in issue, 544. *Bills of Exchange*, III. 2.
3. Traverse of payment and acceptance in satisfaction, does not admit the payment, 134. *Replication*, IV.

XXIV. Other admissions.

1. An affidavit used by the party against whom it is given in evidence.
If a party, on motion before a judge, use the affidavit of another person, such affidavit is, on any subsequent occasion, admissible as evidence against him who so used it. Even on a trial when the

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person who swore the affidavit is present in Court and is not called. *Brickell v. Hulse*, 454.

2. How far the whole of a conversation is made evidence by part being proved.

A witness, who has been cross-examined as to what plaintiff said in a particular conversation, cannot, on that ground, be re-examined as to other assertions, made by the plaintiff in the same conversation, but not connected with the assertions to which the cross-examination related. Although the assertions, as to which it is proposed to re examine, be connected with the subject-matter of the present suit. *Prince v. Samo*, 627.

XXV. Declarations against interest.

1. Of party in receipt of rents.

In ejectment on the demise of S, evidence is admissible to shew that a deceased party, being then in receipt of the rents, executed a deed, charging the land with an annuity, in which he stated S. to be legal owner of the fee, and himself to hold, for the term of his natural life, by permission of S. *Doe dem. Daniel v. Coulthred*, 235.

2. By tenant so as to affect landlord.

The question in a cause being, whether a particular road, admitted to exist, was public or private, evidence was offered that a person, since deceased, had planted a willow on a spot adjoining the road, on ground of which he was a tenant, saying, at the same time, that he planted it to shew where the boundary of the road was when he was a boy.

Held, that such declaration was not evidence, either as shewing reputation, as a statement accompanying an act, or as the admission of an occupier against his own interest. *Regina v. Bliss*, 550.

XXVI. Declarations, part of res gestæ.

1. Restriction on the admissibility, where the act itself is not relevant, 550. *Ante*, XXV. 2.
2. What degree of connection with testator necessary to render letters to him admissible as evidence of his competency, 513. *Post*, XXVIII.

XXVII. Declarations of a third person.

1. When admissible. *Ante*, XXV., XXVI. *Post*, XXVIII.
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2. When they may be given in evidence, though he is present in court, 454. *Antè*, XXIV. 1.

XXVIII. *Res inter alios actæ*.

Letters from third person to testator, on a trial of competency.

On an issue raising the question whether or not a testator had, during any part of his life, possessed ordinary powers of understanding, letters were produced in evidence, written at various periods, and sent to the testator by persons acquainted with him, and since deceased, in which the writers addressed him as an intelligent man: Held, by the Court of King's Bench, that such letters were not admissible unless connected in evidence with some act done by the testator.

Where improper evidence is received, and a verdict given for the party adducing it, the Court will grant a new trial, although there be other evidence to the same point in favour of the same party; unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence: Held, by the court of K. B.

Three letters, produced as above, were found in a cupboard in the testator's private room, after his death, with the seals broken, among other letters, some of which (but not these) had been answered, and some (but not these) indorsed by him. The three letters were as follows:

1. A letter of friendship from T., a relation of the testator abroad. The testator was proved to have sent a letter to T. three years afterwards, alluding to some intermediate correspondence between them, but not to T.'s first letter.

2. A letter from O. M. advising the testator to direct that his attorney should take steps in a transaction with a certain parish. This letter was indorsed, in the hand-writing of the testator's then attorney, since dead, with the date, and a memorandum that it was a letter from O. M. to the testator.

3. A letter of gratitude to the testator from E., a clergyman to whom he had formerly given preferment.

The testator died in 1826, aged

sixty-eight. The three letters were dated respectively 1784, 1786, 1799.

Held, in the Exchequer Chamber, by *Coltman* and *Bosanquet* Js., and *Parke* B., that none of these letters were admissible as connected by evidence with any act of the testator. By *Gurney* B. and *Park* J. that all three were so admissible. By *Tindal* C. J. that letter 2. was so admissible; but not letters 1. and 3. By the whole Court, that, unless so connected, the letters were not admissible as either declarations or acts of the writers. *Wright v. Doe dem. Talham*, 313.

XXIX. Reputation.

1. Presentment by tenants when not evidence of boundary of manor, 617. *Antè*, XVIII. 2.
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- I. Evidence of probate, 240. *Probate*.
- II. Liability for torts of testator.
An administrator is liable to an action for money had and received by the intestate for coal tortiously taken by him from the plaintiff's land, if the

intestate has sold it and received the money.

And this, although no direct evidence be given of the actual sum received on the sale, if the jury believe the fact of the sale.

And, where part has been raised more than six months before the intestate's death, and part within six months, the plaintiff may bring trespass, under stat. 3 & 4 W. 4. c. 42. s. 2., for so much as was raised within the six months, and also money had and received for so much as was raised before; the acts being distinct, and therefore the two actions not incompatible. *Powell v. Rees*, 426.

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Whether extra-parochial.

By the Foundling Hospital Act, stat. 13 G. 2. c. 29., the hospital is incorporated by the name of *The Governors and Guardians of the Hospital for the maintenance and education of exposed and deserted young children*; and has power to purchase lands, and erect or

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purchase buildings for such maintenance, &c.; and the lands, &c., shall be rated as in 1739; the corporation may receive, &c., as many children as they think fit; any person may bring children to be received by them in case the corporation think proper; no parochial officer is to prevent persons from so doing, nor to exercise any parochial authority in the hospital; and no settlement is gained by being received, maintained, educated, or employed therein; and the corporation has power to make by-laws.

Held, first, that the hospital is not extra-parochial.

Secondly, that this power to receive children is discretionary.

Therefore, where a woman left a parcel containing a child at the hospital, but went away before the contents were ascertained, and was not again found, and the governors, acting in conformity with their rules, refused to receive it: Held, that on such refusal (found as a fact by the jury, on trial of a mandamus, under the judge's direction) the parish of *St. Pancras*, within the ambit of which the hospital is, was bound to maintain the child as casual poor. *Regina v. St. Pancras, 750.*

II. Receipt of children discretionary, 750. *Ante, I.*

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FRAUDULENT CONVEYANCE.

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I. Power of regulating.

Under St. Marylebone local act.

The power of regulating hackney coach stands, given to the vestry of *St. Marylebone* by the local act, 35 *G. 3. c. 73. s. 95.*, is not superseded by the General Hackney Coach Act, 1 & 2 *W. 4. c. 22.*

Quære, whether, in the absence of such local authority, stat. 1 & 2 *W. 4. c. 22.* gives liberty to ply with hackney carriages in any place within the limits subject to that act?

Quære, whether, by stat. 1 & 2 *W. 4. c. 22. s. 30.*, the commissioners of stamps have authority to appoint stands for hackney carriages?

A hackney carriage standing in the highway, contrary to regulations made by the vestry, under stat. 35 *G. 3. c. 73. s. 95.*, is liable to seizure under stat. 57 *G. 3. c. xxix.*, local and personal, public (*M. A. Taylor's Act*), *s. 65.*, not being within the exemption there given to carriages standing for hire according to the statutes.

Quære, whether a licensed cabriolet be within the exemption given by the last-mentioned clause to "*such coaches, chariots and chairs*" as have been or shall be hereafter licensed," &c. *Frost v. Williams*, 773.

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HEREDITAMENT.

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On insane prisoner refusing to plead, 536. *Insanity*, I.

INSANITY.

- I. Practice on refusal of insane prisoner to plead to indictment.

A party having been indicted for a misdemeanour in uttering seditious words, and, upon his arraignment, refusing to plead, and shewing symptoms of insanity, and an inquest being forthwith taken under stat. 40 G. 3. c. 94. s. 2., to try whether he was insane or not: Held,

1. That the jury might form their own judgment of the present state of the defendant's mind from his demeanour while the inquest was being taken; and might thereupon find him to be insane without any evidence being given as to his present state.

2. That, upon the prisoner shewing strong symptoms of insanity in Court during the taking of the inquest, it became unnecessary to ask him whether he would cross-examine the witnesses on the inquest, or would offer any remarks or evidence. *Regina v. Goode*, 536.

- II. Evidence on which the jury may find the prisoner insane, 536. *Ante*, I.

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- I. Conveyance by provisional to creditor assignee.

1. Form of, 909. *Statute*, XXXII. 1.
2. Evidence of order of Court, 909. *Statute*, XXXII. 1.

- II. Assignment by.

When void.

Under stat. 7 G. 4. c. 57. s. 32., an assignment of property by an insolvent, made after the commencement of his imprisonment, and before the assign-

ment to the provisional assignee, for the benefit of all the creditors, in satisfaction of all debts owing to the creditors joining in the deed, without new consideration, or pressure, is fraudulent and void as against the assignee under the act; and he may bring an action for money had and received, against the trustee under such deed, for any sum which the latter receives. *Binn v. Towsey*, 869.

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Of overseer's accounts, 461. *Poor*, II. 1.

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Marine.

- I. The policy.

Whether there is any difference between time policies and others as to the implied warranty of seaworthiness, 40. *Post*, II.

- II. Implied warranties.

Seaworthiness.

To a declaration by assured against underwriter of a policy on ship, at and from any port or ports, for twelve months, alleging loss by perils of the seas, defendant pleaded that, *during the time for which the ship was insured, and before the loss*, she was damaged and unseaworthy, but, by reasonable care, and at small cost, compared with her value, she *might and ought to have been by plaintiff repaired and rendered seaworthy*; yet plaintiff, *well knowing the premises*, did not repair and render her seaworthy, but neglected, &c., and she remained in such unseaworthy state till the loss. Demurrer, because it was not stated that the non-repair caused the loss.

Quære, whether, in an action as above, it would be a defence, that, after the commencement of the risk, the ship by actual default on the part of the assured, shewing gross negligence, became unseaworthy and was lost? But,

Held that, at all events, this plea was bad, as it did not sufficiently aver knowledge by the assured that the ship was unseaworthy, and might have been repaired before the loss; nor did it shew that he could in fact, if not grossly negligent, have repaired before the

the loss; or that the loss was occasioned by his alleged default.

Per Patteson J. The implied warranty of seaworthiness, on the part of the assured, refers to the commencement of the risk: the only exception is, where pilots, or a particular description of crew, are necessary in certain parts of the voyage. There is no difference, as to such implied warranty, between time policies and others. *Hollingworth v. Brodrick*, 40.

III. Defence.

Negligence on the part of the assured, 40. *Antè*, II.

IV. Pleading.

1. When scienter must be shewn in pleading breach of warranty, 40. *Antè*, II.
2. When gross negligence must be shewn in pleading breach of warranty, 40. *Antè*, II.
3. When the default pleaded must be stated in the plea to have been the cause of loss, 40. *Antè*, II.

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- II. From finding of sessions, 461. 471. *Poor*, XII. 2.

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- I. In lands, 49. *Statute*, X.
- II. In estate, what sufficient to confer a settlement, 70. *Poor*, IX. 1.
- III. Of third party, what sufficient to make his declarations evidence, 235. *Evidence*, XXV. 1.
- IV. Declarations against, 550. *Evidence*, XXV. 2.
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- III. Question for the.
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 2. What is a question for the jury. *Jury*.

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- I. On demurrer to whole declaration, where one of the counts is good, 841. *Demurrer*, I.
- II. Non obstante veredicto.
How far rule nisi may be remoulded, 557. *Master and Servant*, II. 2.
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Set off of costs, 610. *Ejectment*, V.
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- VI. In ejectment, effect of after writ of possession set aside, 610. *Ejectment*, V.
- VII. To secure attorney's bill, when ordered to be set aside, 524. *Attorney*, III.
- VIII. In criminal cases.
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III. Of court of quarter sessions, in estimating recognizances, 583. *Recognizances*.

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I. Evidence to be left to, 235. *Libel*, I. 1.

II. What is a question for the.
1. Whether verbal agreement to pay rent was absolute or conditional, 54. *Landlord and Tenant*, III.
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On what they may form their judgment, 556. *Insanity*, I.

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I. Whether under the old bastardy laws, two justices might make two orders at the same sittings, and declare the last to be the one they meant to enforce, 807. *Poor*, XVII. 2.

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III. Affidavit for criminal information by, 190. *Criminal Information*, I. 1.

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I. Of obligee, when it causes damages to be only nominal, 143. *Principal and Surety*, I.

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I. Interest in, 49. *Statute X*.

II. How rated to the relief of the poor.
1. When occupied by canal company under local acts, 671. *Poor*, III. 2.
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LANDLORD AND TENANT.

I. Tenancy how created.

1. Lease or agreement.

Contract (dated April 28th) as follows:—*A.* agrees to execute to *B.* a lease of all that messuage, &c., habendum to *B.*, his executors, &c., for seven years, from 24th June next, at the yearly rent of 105*l.*, payable half yearly; the lease to contain covenants to pay rent and to repair, with proviso for re-entry on non-performance of covenants: *B.* agrees to accept such lease and execute a counterpart, and *B.* further agrees, when the dwelling-houses on each side of the messuage hereby agreed to be demised shall be tenanted; to pay an additional yearly rent of 15*l.* during the residue of the seven years; *A.* agrees, on or before June 24th, to erect eight pannels, &c. (several works to be done

done by *A.* were then specified, as to paper certain rooms, fix a range and stoves, hang bells, lay on water, &c.): and it is agreed that, by the said lease hereby agreed to be granted, the rent reserved shall be 120*l.*, and that, by a separate deed, to bear date the day after such lease, *A.* shall release to *B.* the annual sum of 15*l.* out of such rent of 120*l.*; *B.* to prepare the lease at his own cost, to be approved of by *A.*'s solicitor. *A.* to have the option of making the lease fourteen years.

B. entered and paid rent to *A.*, as first mentioned. No lease was executed.

Held, that the contract was not a lease, but an agreement merely.

And, *A.* having, after execution of the contract, mortgaged the premises and become bankrupt, of which the mortgagee gave *B.* notice,

Held, that the mortgagee might bring an action of use and occupation against *B.* for the rent accruing in the half year during which the notice was given. *Rauzon v. Eicke*, 451.

2. Lease or agreement, 492. *Poor*, X.

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3. Lease, "not otherwise charged," within the words of the Stamp Act, 492, *Poor*, X. 1.

4. Where the demise is of hereditaments partly incorporeal, 492. *Poor*, X. 1.

5. By payment of acknowledgment to assignee of lessor; how it may be explained, 447. *Ejectment*, IV. 3.

II. Agreements collateral to the tenancy.

Agreement by the landlord to send in furniture, when inseparable from the contract to let, 49. *Statute*, X.

III. Rent when due.

When only conditionally.

M. agreed verbally with *W.*'s agent to take a house of *W.*, furnished, at 170*l.* a year rent, for the house and furniture payable quarterly, and in advance. The house was furnished only in part, but the agent said that it should be completely furnished; not, however, specifying any time. *M.* was let into possession within a month from the above treaty. After the expiration of a quarter, *W.* distrained for rent, the furniture not having been sent in as promised. *M.* brought trespass.

Held, that it was a question for the jury whether the agreement to pay

rent was absolute, or on condition only of the furniture being sent in; that there was evidence upon which they might find it to have been conditional; and, therefore, that the jury having found a verdict for the plaintiff, the distress was not justified. *Mechelen v. Wallace*, 54. n.

IV. State of premises at time of demise.

When material, 136. *Post*, V.

V. Repairs.

Evidence as to amount of damage.

Assumpsit on a promise, by a tenant, to keep premises in good and sufficient repair; and breach by not so keeping. Plea, payment of 5*l.* into Court, and no further damage.

On an issue taken upon such plea, the defendant is entitled to prove at the trial what the state of the premises was at the time of the demise. *Burdett v. Withers*, 136.

VI. Landlord's remedy.

1. Against executor of tenant for injury to the realty, 426. *Executor*, II.

2. Distress on goods of tenant holding over.

Tenant of a farm, having remained a few days after the expiration of his term, and after entry by a new tenant, went away, leaving a cow and some pigs, but giving no further intimation of a purpose to return, or to continue holding any part of the farm: Held, that the landlord could not justify distraining the goods so left for arrears of rent, under stat. 8 Ann. c. 14. ss. 6, 7. *Taylorson v. Peters*, 110.

3. Rights of mortgagee against a party in possession under agreement for lease, 451. *Antd.*, I. 1.

VII. Waste, 540. *Waste*.

VIII. Tenant from year to year.

Waste by, 540. *Waste*.

IX. Tenant holding over.

What not a sufficient possession to authorise landlord to distrain, 110. *Antd.*, VI. 2.

X. Rights of tenant.

When he is entitled to compensation from trustees taking his land for a turnpike road, 124. *Compensation*, II. 1.

XI. Effect of tenant's acts, as regards a third person.

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not evidence against landlord, 550. *Evidence*, XXV. 2.

XII. Estoppel of tenant.

Explanation of mistakes and misrepresentations, 447. *Ejectment*, IV. 3.

XIII. Pleading.

1. Avowry under 21 H. 8. c. 19. s. 2., without naming tenant, 843. *Replevin*.
2. Avowry under 11 G. 2. c. 19. s. 22., without shewing title, 843. *Replevin*.
3. Case for waste, 540. *Waste*.

LAPSE.

When it incurs on avoidance by accepting another benefice, 289. *Simony*, I.

LARGENESS.

Of demurrer, 841. *Demurrer*, I.

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- I. Mistake by sessions on a point of law, how rectified, 27. *Sessions*, I. 5.
- II. Ignorance of, 441. *Statute*, XLV. 4.

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When entitled to compensation for lands taken for a turnpike road, 124. *Compensation*, II. 1.

LETTERS.

To testator, admissibility of, in proof of his competency, 313. *Evidence*, XXVIII.

LETTERS OF ADMINISTRATION.

p. 240. *Probate*.

LIBEL.

I. Publication.

1. In an action against A. for publishing a libel, evidence sufficient to go to a jury is furnished by proof that a libel was actually published; that it was a

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printed paper, since destroyed; that it corresponded with a printed paper produced; and that A. printed a paper corresponding with that produced, and sent 300 to a shop from whence a person actually publishing the libel procured it; and that the libel was, on that occasion, taken from a parcel apparently containing 500. *Johnson v. Hudson*, 233.

2. Whether statutory proof of publication of newspapers is admissible to prove publication by plaintiff, 223. *Post*, IV.

3. Of one copy not evidence of publication of another, 223. *Post*, IV.

II. Secondary evidence when admissible, 233. *Anst.*, I. 1.

III. Proof in cases of joint libel, *Johnson v. Hudson*, 233.

IV. Evidence in mitigation of damages.

Provocation by plaintiff.

In an action of libel the defendant may shew, in mitigation, that he was provoked to issue the libel by publications of the plaintiff reflecting upon him.

Quære, whether the means of proof furnished by stat. 38 G. 3. c. 78. ss. 11. and 17. (and see now stat. 6 & 7 W. 4. c. 76. s. 8.), as to the publication of newspapers, be applicable to prove such publication by a plaintiff.

A defendant offering such evidence in mitigation must prove that the libel which he complains of came to his knowledge before he libelled the plaintiff.

The mere production from the Stamp Office of a newspaper deposited there by the plaintiff as publisher, according to stat. 38 G. 3. c. 78. s. 17., does not prove this fact.

Nor is it even to be inferred from the deposit of such newspaper that similar ones were published to the world in general.

If defendant alleges in mitigation that a libellous book was published against him by plaintiff, and, in support of such case, a bookseller produces, from his own possession, a printed book, stating his belief that it is one of a number of copies published at his shop, this is not evidence for the jury that another book with the same contents was actually published. *Watts v. Fraser*, 223.

LIFE.

LIFE.

LIFE.

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Mayor and aldermen.
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Of market, his powers, 95. *Market*, I.

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LOSS.

- I. Cause of, 40. *Insurance*, II.
- II. Of qualification by town councillor,
963. 966. *Statute*, XLIV. 3. 5.
- III. Of office under Municipal Reform
Act. *Statute*, XLIV. 7, 8, 9.

MACHINERY.

Rateability of, 951. *Poor*, III. 1.

MAGISTRATE.

Justice.

MAJORITY.

Of officers to sign notice of filiation,
480. *Poor*, I. 4.

MANDAMUS.

- I. When it lies.
 1. To elect churchwardens, after a
void election.

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One of two candidates for the office
of churchwarden was elected at a vestry,
and subscribed the declaration of office,
but the election was alleged to have
been so improperly conducted that the
proceedings were void. To give the
parties impugning the election an op-
portunity of trying its validity, the
Court (considering a *prima facie* case
to be presented) granted a mandamus
calling on the rector and church-
wardens to convene a vestry for elect-
ing a churchwarden for the remainder
of the year.

At an election in vestry, where the
right of voting is regulated by *Sturges
Bourne's Act*, 58 G. 3. c. 69. s. 3., it is
no objection to the proceedings that
the chairman directed a poll without
first taking a shew of hands: although
a shew of hands was demanded, and
the poll was not demanded, but was
objected to. Per Lord Denman C.J.
and Littledale J. *Rex v. Birmingham*,
254.

2. Notwithstanding plenarty, if there
is no other remedy, 254. *Ante*, 1.
3. To lay a rate in the nature of a
church-rate, required by statute to
be confirmed by justices of the peace,
925. *Post*, V.
4. Whether it lies to assess compensa-
tion under Municipal Corporations
Act, in review of a decision of the
Lords of the Treasury, 139. *Statute*,
XLIV. 7.
5. For repayment of loan under church-
building acts, 548. *Pleading*, IX. 1.

II. Where it does not lie.

1. To sessions to hear an appeal, after
a mistake in rejecting evidence, 27.
Sessions, I. 5.
2. For office that is full, there being a
remedy by quo warranto.

At the first election of councillors
for a ward, under stat. 5 & 6 W. 4.
c. 76., A. and B. were elected by the
smallest numbers. At the election of
aldermen immediately following, two
of the councillors elected by higher
numbers were chosen aldermen. C.
and D. were chosen councillors in their
places, each by fewer votes than had
been given for A. or B. At the time
for electing councillors in the following
year, A. and B. remained in office, and
C. was elected councillor in another
ward, and was admitted to the office.
The

The candidate for that office who had had the next largest number of votes disputed the election, on the grounds that C. was still a councillor of the first ward, inasmuch as he had been chosen to fill an extraordinary vacancy; that this fact was notorious to the burgesses; and, consequently, that the votes given for C. in the second ward were thrown away. A mandamus was therefore moved for to swear in the opposing candidate.

Held that, assuming the objections to be well founded (on which the Court did not decide), a mandamus could not go, the office being full, and being one for which a quo warranto might be brought. *Regina v. Derby (Justices)*, 419.

3. To admit town councillor when office full de facto, 215. *Municipal Corporation*, IV. 8.

III. When refused.

1. To sessions to hear an appeal which they have, in fact, heard, 425. *Poor*, XIII. 2.

2. When the benefit sought to be enforced is only nominal, 139. *Statute*, XLIV. 7.

3. To proceed to election of councillor on a disputed vacancy, 966. *Statute*, XLIV. 3.

IV. Direction.

To wardens, overseers, and inhabitants, 935. *Post*, V.

V. Return.

Existence of another fund applicable to the purposes when not an answer to a mandamus to lay a rate.

King James I., by charter granted the rectory of *St. Saviour's, Southwark*, in trust for the churchwardens of the parish and their successors, enjoining them, *out of the revenues*, to pay certain yearly salaries to chaplains and a schoolmaster, and to repair the parish church.

By stat. 22 & 23 Car. 2. c. 28. (private), reciting that the revenues of the rectory were insufficient for the above purposes, the parishioners were discharged from all tithes belonging to the rectory; and it was enacted that, in consideration thereof, *it should be lawful* for the churchwardens for the time being, and overseers, giving notice to, or calling together *six or more of*

the inhabitants, having certain qualifications, to assemble yearly in vestry, and make a rate not exceeding 350*l.* in a year; and that the churchwardens should pay yearly for ever to the chaplains, schoolmaster, and usher, salaries amounting in the whole to 250*l.*, which sums should be *in lieu* of all monies payable to the chaplains, &c., by virtue of the charter; and all the residue of the monies so to be raised should be applied to repairs of the church and other church affairs as the wardens should think meet.

Stat. 56 G. 5. c. 1*v.* (reciting that the rate before mentioned, and the revenue of the rectory under the management of the wardens, were inadequate to the above purposes) repealed the former act as to the amount to be raised by rate, and enacted that, for the purposes of that act, *it should be lawful* for the wardens, overseers, and other inhabitants of the parish, in vestry, and they were thereby empowered, to make an annual rate as there described, which rate should be *confirmed by two justices of the peace*, and the sum levied should be applied as follows, viz. the wardens should pay yearly to the chaplains, schoolmaster and usher, certain salaries (which were specified), and such salaries should be *in lieu* of all monies payable to them by virtue of the charter, and the residue should be applied as directed by the former act.

The wardens, overseers, and inhabitants met in vestry, and refused to make a rate; the salaries remained unpaid, and the church was dilapidated. On motion for a mandamus to compel the making of a rate for the purposes of the above statutes: Held, that the ordering of such rate was not a matter of ecclesiastical jurisdiction; and that a mandamus might issue to the wardens, overseers, and inhabitants.

On return to the mandamus, the Court refused to hear the return discussed on motion to quash (the ground alleged being the urgency of the circumstances), but directed that the case should be argued on an early day upon concilium.

Held, on such argument, that, although a revenue might be still derivable from the rectory, a rate under the statutes was the primary fund from which the salaries were to be paid, and that

that the alleged existence of such revenue was no answer to the mandamus.

Held, further, that such mandamus, since stat. 56 G. 3. c. 1v., was properly directed to the wardens, overseers, and other inhabitants generally, and not to the wardens, overseers, and six or more qualified inhabitants, according to stat. 22 & 23 Car. 2. c. 28.

Return to the mandamus was made by the wardens, two overseers, and six inhabitants, and a further return by five inhabitants. On the concilium the former parties did not dispute the making of the rate, but contended only that the mandamus was improperly directed. The latter denied that a rate could properly be made. After quashing the return, the Court ordered (under stat. 1 W. 4. c. 21. s. 6.) that the wardens, overseers, and inhabitants should pay costs, but that the wardens and overseers should not be personally liable as such. *Regina v. St. Saviour's Southwark*, 925.

VI. Pleading.

On mandamus to lay a church-rate to repay loans, 458. *Pleading*, IX. 1.

VII. Practice.

1. Rule absolute in the first instance, when the necessity of the case requires it, 280. *Post*, 3.
2. Rule cannot be discussed along with rule for quo warranto to try the same question, 215. *Municipal Corporation*, IV. 2.
3. Writ when returnable.

By the rule of *Mich. 4 Ann.*, there must be fourteen days, at the least, between the teste and return of every original writ of mandamus, if directed to parties residing beyond forty miles from *Westminster*; and, if to parties within forty miles, then eight days.

Quere, whether the Court, on a proper case being shewn, will direct the return to be made in a shorter time?

But if, without special direction of the Court, the mandamus be drawn so as to allow less time between the teste and the return, the Court will supersede the mandamus for irregularity, and award an alias writ.

And this, though the case be one in which the Court, on the ground of urgency, grant the rule for the mandamus absolute in the first instance; as

where the writ issues to compel payment of money for the support of paupers. *Rex v. St. Andrew Holborn*, 281.

4. Return when not discussed on motion to quash it, 925. *Ante*, V.
5. Supersedeas, 281. *Ante*, 3.

VIII. Costs.

Discretion of the Court, under 1 W. 4. c. 21. s. 6. how exercised, 923. *Ante*, V.

MANOR.

Boundary.

Ancient survey, when not evidence, as authorised by the statute *Extenta Manerii*, 617. *Evidence*, XVIII. 2.

MARKET.

I. Rights of public on removal of.

B., being entitled to a market in the manor of *K.*, which was held in the public street on *B.*'s soil, removed it to another site in *K.*, which site he had demised, without demising the franchise, for a term of years. Per *Littledale J.*, the removal was bad, because the lord of the market ought to be owner of the soil in which the market is held.

By all the Court: The removal was at any rate bad, unless the public had the same privilege in the new market as in the old: and therefore, it appearing that no toll had ever been taken in the old market, but that the lease, after a covenant by the lessees to allow the soil to be used solely for the market, empowered them to impose rents at their discretion for the liberty of selling in the market, the Court held that the removal was bad, and that the site of the old market, on the king's highway, might be used on market days as it was before the removal. *Rex v. Starkey*, 95.

II. Who, as regards the acts of the parties, must be owner of the soil, 95. *Ante*, I.

MARRIAGE.

I. Of mother, effect of on right to remove bastard to its settlement, 819. *Poor*, V.

II. Dissolution of voidable, effect on order of removal of husband and wife previously confirmed on appeal, 761. *Poor*, XI. 2.

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MASTER AND SERVANT.

I. Contract of hiring.

What is an exceptive hiring, 866. *Poor*, VII. 2.

II. Termination of contract.

1. By notice.

Declaration stated that defendant promised plaintiff to employ him as reporter to a newspaper, for a given salary, for one whole year, from 20th May, and so from year to year, to the end of each year commenced while the plaintiff should be so employed, reckoning each year to commence from 20th May, for so long as plaintiff and defendant should respectively please: breach, that, after plaintiff had continued in the employment two years and part of a third, defendant would not continue plaintiff in the employment to the end of the third year, but discharged him.

Plea, that defendant offered to pay plaintiff a sum of money larger than plaintiff would have been entitled to if a reasonable notice of determining the agreement had been given, and required plaintiff to quit immediately, and at the same time gave him a reasonable notice of defendant's intention, in case the tender was refused, to put an end to the agreement, to wit at the end of three weeks from 3d October instant; the plaintiff refused to accept and quit, whereupon defendant discharged him at the expiration of the notice; and that defendant was still ready to pay the sum tendered. On demurrer,

Held, that the contract alleged in the declaration and confessed in the plea, was determinable only by notice ending with a current year; and, therefore, that the plea was no answer. *Williams v. Byrne*, 177.

2. What degree of misconduct warrants discharge.

Declaration in assumpsit stated that, in consideration that plaintiff, at defendant's request, would enter into his employ as teacher of French and drawing in defendant's school for a year, at a yearly salary, defendant undertook, &c., to retain and employ plaintiff for the time aforesaid in that capacity and on those terms: that plaintiff entered into the employ, and was willing to remain &c., but defendant, during the

term, without notice or reasonable cause, discharged plaintiff, and refused to pay him from that time. Plea, that, when defendant retained plaintiff, and defendant made the promise, as in the declaration mentioned, plaintiff, in consideration of the premises, promised well, &c., to serve him in the said capacity, and not to absent himself except during vacations appointed by plaintiff: that defendant retained plaintiff, as in the declaration mentioned, on the faith and in consideration of such promise, and was always ready to continue, &c., until plaintiff's misconduct after-mentioned: that defendant appointed a vacation, to cease on a certain day, when plaintiff was to return to the school and resume his duties; that, on that day, the pupils returned, and the school recommenced, as plaintiff knew; that plaintiff did not return to the school and resume his duties, but wrongfully absented himself for a long and unreasonable period, without reasonable cause or defendant's consent; whereby defendant was delayed and injured in respect of divers matters and businesses in which he would have employed plaintiff in his said situation and capacity during that period, and was forced to endeavour to procure another person to serve him in that capacity instead of plaintiff; whereupon it became lawful and necessary for him to discharge plaintiff; wherefore, &c. Plaintiff having pleaded over, and defendant having obtained a verdict, Held,

1. That the plea neither shewed that the contract was put an end to, nor that defendant had a right to dissolve it.

2. That it sufficiently confessed the declaration, and that plaintiff therefore was entitled to judgment non obstante veredicto.

3. Per *Patteson J.*, that, if the plea had not confessed the declaration, a repleader must have been awarded, and that the Court for that purpose would have remoulded the rule nisi obtained for judgment non obstante veredicto. *Fillicul v. Armstrong*, 557.

3. Remedy for improper discharge.

Where a servant, under a quarterly hiring, is discharged by his master without sufficient cause in the middle of the quarter, *semble*, that he cannot recover

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cover wages for the whole quarter under a count in indebitatus assumpsit for work and labour; although after the dismissal he tendered himself to serve through the remaining part of the quarter.

But, at all events, a servant improperly dismissed in the middle of a quarter, and who tendered himself, but was not allowed, to serve through the remaining part of the quarter, cannot recover wages for such part in an action of indebitatus assumpsit for work and labour, commenced before the quarter ended. *Smith v. Hayward*, 544.

III. Remedy of servant. *Antè*, II.

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Of averment of quantity, 1. *Pleading*, XXIII. 2.

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II. When it may be explained so as to prevent an estoppel, 447. *Ejectment*, IV. 3.

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IV. Of burgesses misled by an unauthorised notice of the mayor, 963. *Statute*, XLIV. 5.

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I. Mortgagee.

His rights against a party let into possession under an agreement for lease, 451. *Landlord and Tenant*, I. 1.

II. When a prior mortgage by vendor cannot be set up as a defence in ejectment brought by vendee, 187. *Estoppel*, VIII. 2.

III. After judgment in ejectment.

When mortgagee cannot hold possession without a writ of possession, 610. *Ejectment*, V.

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MOTION.

- I. To quash return to mandamus, 925. *Mandamus*, V.
- II. To set aside award. *Arbitration*.

MUNICIPAL CORPORATION.

- I. When merely trustees 730. *Statute*, XLIV. 8.
- II. Quo warranto against freeman, 745. *Quo Warranto*, III. 1.
- III. Burgess roll.
Omission of councillor from, 966. *Statute*, XLIV. 3.
- IV. Election of councillors.
 1. What notice of vacancy to be supplied necessary, 215. *Post*, IV. 8.
 2. Proceeding on vacancy by bankruptcy, 963. *Statute*, XLIV. 5.
 3. Defect in title of presiding officer, 430. *Statute*, XLV. 1.
 4. Notice of disqualification should be given, 960. *Statute*, XLIV. 2.
 5. Votes when thrown away on disqualified candidate, 960. *Statute*, XLIV. 2.
 6. Votes thrown away as given for too many candidates, 215. 963. *Post*, IV. 8. *Statute*, XLIV. 5.
 7. Defective act of councillors how cured, 435. *Statute*, XLV. 2.
 8. What admission causes the office to be full.

In a ward of a borough, one of the councillors, the ward having six, was chosen for alderman. His place was not filled up till the next annual election of councillors. At that election, no notice was given that his place was to be supplied. Some of the voting-papers had three names, some two. The majority on all the papers taken together, and also on the papers having three names, was for *A.*, *B.*, and *C.* On the papers having two names only, it was for *Y.* and *Z.* The alderman and assessors for the ward declared *A.*, *B.*, and *C.* duly elected. Afterwards, the assessors published a declaration that *Y.* and *Z.* were duly elected. *A.*, *B.*, and *C.* took the declaration and acted. Afterwards *Y.* and *Z.* took the declaration, and demanded to act, but were not permitted.

Held (before stat. 7 *W.* 4. and 1 *Fict.* c. 78.) that, even assuming that *Y.* and

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Z. should have been declared duly elected, the office was full, de facto, of *A.*, *B.*, and *C.*, and no mandamus could go to command the mayor, &c., to allow *Y.* and *Z.* to act.

A rule nisi having been obtained for a mandamus as above, *Y.* and *Z.* afterwards obtained a rule for a quo warranto against *A.*, *B.*, and *C.* The Court refused to hear the two rules discussed together; but, after discharging the rule for a mandamus on argument, they made the rule absolute for a quo warranto. *Res v. Winchester*, 215.

- V. Mayor.
Erroneous notice by, effect of, 963. *Statute*, XLIV. 5.
2. When not bound to take notice of vacancy in council, 966. *Statute*, XLIV. 3.
- VI. Alderman.
 1. Defect in election of proper number, 435. *Statute*, XLV. 2.
 2. When not bound to take notice of vacancy in council, 966. *Statute*, XLIV. 3.
- VII. Town council.
 1. When mandamus does not lie to admit town councillor, 419. *Mandamus*, II. 2.
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 3. Vacancy by bankruptcy, 963. *Statute*, XLIV. 5.
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- VIII. Assessor.
His disqualification from being elected a town councillor, 960. *Statute*, XLIV. 2.
- IX. Clerk of the peace.
How far he differs from the clerk of the peace for a county, 756. *Statute*, XLIV. 10.
- X. Town clerk.
How far his office analogous to that of clerk of the peace for a county, 756. *Statute*, XLIV. 10.
- IX. Borough rate.
 1. Notice of appeal, to whom to be given, 756. *Statute*, XLIV. 10.
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- XII. Compensation, 139. 730. 739. *Statute*, XLIV. 7, 8, 9.

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- I. p. 167. *Contempt*.
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- I. For admission of improper evidence, 313. *Evidence*, XXVIII.
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- I. Evidence under plea of, to action on a banker's cheque, 114. *Statute*, XXIII. 1.
- II. Defence in reduction of damages. When admissible, 143. *Principal and Surety*, I.

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- II. Whether notoriety is equivalent to it, 419. *Mandamus*, II. 2.
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- XV. In pleading.
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- I. Of days from teste to return of writ, 281. *Mandamus*, VI. 3.
- II. In pleading.

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- III. Of officers to sign notice in bastardy, 480. *Poor*, I. 4.

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- IV. Of names in voting-papers, 215. 963. *Municipal Corporation*, IV. 8. *Statute*, XLIV. 5.

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- I. To admissibility of document, when to be taken, 114. *Statute*, XXIII. 1.
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OFFICE.

- I. Who cannot be grantee.

A person who has an interest incompatible with the office.

By the custom of a lordship in a lead-mining district, there was an officer called a barmaster, appointed by the lord to see that the duties of lot and cope, &c., were properly accounted for to the lord; to be indifferent and to do justice between miner and miner, and miner and adventurer, and the miner and the lord; to apportion veins of ore newly discovered between the discoverer and other adventurers, and the lord; to enforce proper working of the veins; to keep a dish by which all the ore was to be measured; to punish small depredations, and to collect fines. In case of certain defaults, he was himself liable to fines, payable to the lord of the field or his farmer. Certain disputes within the lordship were tried at a customary court called the barmote court, before the deputy stewards and a jury, who were summoned by the barmaster, or his deputy, on precept from the deputy steward. The summoning officer selected them at his discretion.

The lord granted, by indenture, to A. for years, in consideration of a certain fine and rent, all the mines in the district, with the duties of lot and cope, and also, for the same term, the office called the barmastership, with all profits, &c., thereto belonging, at a rent, with a proviso for re-entry, if the grantee should make a deputation of the office without license, or without having such deputation enrolled.

Held, that the grant, as to the barmastership, was void, because the grantee took an interest, as lessee or farmer, incompatible with the duties of barmaster.

That the grant was not void as giving incompatible offices, the lease not conferring an office.

And

And that, on an issue whether or not A. was barmaster at a certain time, the verdict, on the above facts, ought to be entered in the negative. *Arkwright v. Cantrell*, 565.

II. Incompatibility of offices, 565. *Ante*, I.

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IV. Of transportation or hard labour, fees on, 502. *Statute*, XXX.

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2. Part payment, how it may be pleaded, generally to several counts, 164. *Plea*, III.

II. Evidence.

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I. Custom to pass through dwelling-houses.

Plea, to trespass for breaking and entering plaintiff's dwelling-house, that

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the house was in the parish of *B.*, in which there was an immemorial custom for all the parishioners to go through the house, upon their perambulations of the parish boundaries, on the *Thursday* in *Rogation* week, every third year; and justification under the custom. Issue being joined on a traverse of the custom, and a verdict found for the defendants. Held, on motion for judgment non obstante veredicto, that it could not be assumed, on this plea, that the house stood on the boundary; and that the custom was therefore bad, as pleaded.

Entries in the parish books, recording the fact that the perambulations had taken a particular line, would not be evidence upon such an issue. *Taylor v. Devey*, 409.

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- II. When it confesses the contract in the declaration though, it professes to add further terms, 557. *Master and Servant*, II. 2.
- III. How far plea may identify causes of action alleged in different counts of declaration.
To a declaration on indebitatus assumpsit for four causes of action, with one promise and breach, defendant pleaded, as to 2l., "parcel of the said several sums," payment and acceptance in satisfaction of all the damages by reason of non-performance of the said promises as to the 2l.
Held, good, on special demurrer, though the plea did not state to which cause of action the payment applied. *Mitchell v. Townley*, 164.
- IV. In the disjunctive, when bad as traversing several material facts, 1. *Pleading*, XXIII. 2.
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- IX. Claim of right of common by virtue of possession, 698. *Pleading*, XIII.
- X. Custom to perambulate boundaries ill pleaded, 409. *Perambulation*, I.
- XI. Determination of contract by notice, 177. *Master and Servant*, II. 1.
- XII. Justifying imprisonment under commitment for contempt in equity, 167. *Contempt*.
- XIII. Of non-performance by plaintiff; when bad for duplicity, 1. *Pleading*, XXIII. 2.
- XIV. Payment.
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2. Replication de injuria, when not bad for duplicity, as putting in issue more than one matter of defence, 161. *Replication*, II. 1.
3. Party pleading double, when he cannot object to duplicity in the replication, 161. *Replication*, II. 1.

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Mandamus to churchwardens, to raise a rate to pay principal and interest of money borrowed on the credit of parish and church-rates, under the church-building acts, 58 G. 3. c. 45., and 59 G. 3. c. 134.

Return, that, since the security was given, the lender, who was the prosecutor, had become bankrupt.

Plea, that the prosecutor had lent he money as trustee for a party named, out of monies vested in him as trustee, and in which he had no interest except as trustee.

On demurrer, assigning for cause, that the nature of the trust did not appear: Held good. *Regina v. Brancaster*, 458.

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XIII. Prescription.

Under 2 & 3 W. 4. c. 71.

Trespass for chasing and detaining cattle. Plea, that defendant was possessed of a messuage, &c., and that he and all occupiers thereof for the time being, for thirty years next before the time when, &c., had of right had, and been used, &c., to have common of pasture in the locus in quo, that the cattle were depasturing, &c., to the disturbance of such right of common, and that defendant distrained, &c.

On special demurrer, for that the right was not claimed to have been used, &c., thirty years before the commencement of the suit, Held,

1. That, as a plea under stat. 2 & 3 W. 4. c. 71., the plea was bad, for not claiming the right either so, or as used, &c., thirty years before the commencement of some suit. As to which latter averment, *quære*.

2. That the plea could not be construed as claiming right of common simply by virtue of possession, assuming that, if so construed, it would have been good. *Richards v. Fry*, 698.

XIV. Custom.

Usage of trade ill pleaded, 1. *Post*, XXIII. 2.

XV. Right of party pleading generally.

1. How far landlord, after alleging a demise by a stranger under which rent became due, must shew title in his avowry, 843. *Replevin*, I.
2. Avowry under 21 H. 8. c. 19. s. 2., without naming tenant, must allege defendant's seisin, 843. *Replevin*, I.
3. Replication to plea of bankruptcy of prosecutor, that he is entitled only as trustee, when good without shewing the trust, 458. *Ante*, IX. 1.
4. Performance. *Ante*, XII.

XVI. Right of party pleading. Consideration.

1. Waiver of another remedy must be alleged when forming part of the consideration, 108. *Bankrupt*, I.
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2. When it may be alleged without laying the time, 841. *Demurrer*, I.

XVII. Negligence.

Plaintiff's negligence in not repairing ill pleaded, by not shewing that in fact he could have repaired, 40. *Insurance*, II.

XVIII. Scienter.

Plaintiff's knowledge that certain repairs were necessary and practicable ill pleaded, 40. *Insurance*, II.

XIX. Notice.

1. Insufficient plea of determination of contract by notice, 177. *Master and Servant*, II. 1.
2. Allegation of request, when not tantamount to, 167. *Contempt*.
3. Replication of circumstances imposing a duty on defendant, when bad for not alleging notice, 167. *Contempt*.

XX. Request.

When not tantamount to allegation of notice, 167. *Contempt*.

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1. Justification under a custom to perambulate boundaries bad for not shewing l. i. q. to be on the boundary, 409. *Perambulation*, I.
2. Uncertain description of l. i. q. cured by pleading over, 843. *Replevin*.
3. County when sufficient local description in arrest of judgment, 240. *Probate*.

XXII. Time.

1. When it need not be stated in count on account stated, 841. *Demurrer*, I.
2. When it need not be stated in indubitatus count for goods sold and delivered, 841. *Demurrer*, I.
3. For which right is to be claimed in pleading prescription, 698. *Antè*, XIII.
4. Replication bad for not limiting the complaint to the time not covered by the justification, 167. *Contempt*.

XXIII. Quantity.

1. Uncertain allegation cured by pleading over, 843. *Replevin*, I.
2. Materiality.
Declaration stated that defendant bargained for and bought of plaintiff, and plaintiff sold him a quantity, viz., not less than 5000 nor more than 6000

oak trees, of the height of &c., and at the price of &c., to be well taken up by plaintiff at the usual and proper time, and, within a reasonable time after, to be delivered by plaintiff to defendant, and by him paid for on delivery as aforesaid; and that, in consideration thereof, and that plaintiff promised to take up &c., and deliver &c., defendant promised to accept and pay for the trees. Averment, that plaintiff well and properly took up for defendant six thousand oak trees of the height &c., at the usual and proper time, and was, within a reasonable time, ready to deliver, and tendered, the said trees, but defendant would not accept, &c.

Plea, that plaintiff did not well and properly take up for or tender or offer to deliver to defendant six thousand oak trees of the height &c., in manner and form &c.

Held, 1. That the plea was not bad, as rendering the number of trees material, because the number had been made material by the declaration, the allegation of the precise number being the only allegation shewing that the number taken up was between 5000 and 6000. But, 2., that the plea was bad for duplicity.

Plea, that, by the usage "of trade," and according to the terms of the contract, it was plaintiff's duty not to take up or tender the trees till defendant should give an order, or a reasonable time for his doing so should have elapsed; and that defendant had not given an order, nor had a reasonable time elapsed, by reason whereof the trees, if accepted, would have been of little or no value to defendant. Admitted to be bad.

Further plea, that the trees which defendant bargained for and bought of plaintiff were trees then growing at M., and that the trees taken up and tendered were not the same which defendant bargained for and bought, nor were they trees which, at the time of the bargain, &c., were growing at M. Held bad, as amounting to the general issue. *Smith v. Dixon*, 1.

XXIV. Names of persons.

Avowry for rent due from a person unknown to defendant, 143. *Replevin*, I.

XXV. Materiality.

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XXVI. Traverse.

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1. Attorney plaintiff's bill not delivered, 83. *Attorney*, VII. 2.
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1. That a banker's cheque was post-dated and not stamped, 114. *Statute*, XXIII. 1.
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1. Avowry under 21 H. 8. c. 19. s. 2. without naming tenant, 843. *Replevin*, I.
2. Avowry under 11 G. 2. c. 19. s. 22. without shewing title, 843. *Replevin*, I.
3. Prescription, 2 & 3 W. 4. c. 71., 698. *Antè*, XIII.

XXXII. In particular cases.

1. In assumpsit by assignee of bond against obligor, 19. *Assumpsit*, I.
2. In assumpsit against acceptor of accommodation bills, who pleads the substitution of other bills without his knowledge, 161. *Replication*, II. 1.
3. In action by servant against master for discharging him, 177. *Master and Servant*, II. 1.
4. In assumpsit for the price of trees bargained and sold, 1. *Antè*, XXIII. 2.
5. In assumpsit by a teacher against a schoolmaster, who had dismissed him for defective attendance, 557. *Master and Servant*, II. 2.
6. In action against sheriff for false imprisonment of party in contempt in equity, 167. *Contempt*.
7. In mandamus to lay a church-rate, 458. *Antè*, IX. 1.
8. Custom to perambulate boundaries, 409. *Perambulation*, I.

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9. General plea of payment to several counts, 164. *Plea*, III.

XXXIII. Declaration. *Declaration*, I.**XXXIV. Demurrer. *Demurrer*, I.****XXXV. Plea. *Plea*.****XXXVI. Replication. *Replication*.****XXXVII. New assignment. *New Assignment*.****XXXVIII. Issue.**

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XXXIX. Intendment after verdict.

1. That a chapel frequented and repaired immemorially by the inhabitants of a township, who were also immemorially exempt from contributing to repairs of the parish church, was coeval therewith, 880. *Ecclesiastical Law*, VI.
2. When refused, 409. *Perambulation*, I.

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I. When an answer to application for mandamus, 215. 419. *Mandamus*, II. 2. *Municipal Corporation*, IV. 8.

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I. Government and management.

1. By overseers, 480. *Post*, 5.
2. Assistant overseer, 461. *Post*, II. 1.
3. As part of union, 480. *Post*, 5.
4. Mandamus to pay money for support of poor.

When absolute in the first instance, 281. *Mandamus*, VI. 3.

5. Who shall sign notice of filiation.

A notice of application for an order of maintenance on the putative father of a bastard, under stat. 4 & 5 W. 4. c. 76. s. 73., must be signed by a majority of the aggregate body of churchwardens and overseers; therefore such a notice, signed only by two overseers of a parish, which has also two churchwardens, is bad.

Where such parish forms part of a union *quære*, what officers should make such application and sign such notice?

Per Lord Denman C. J. The requisite number of officers must actually sign such notice. *Regina v. Cambridge-shire (Justices)*, 480.

6. Inspection of overseers' accounts, 461. *Post*, II. 1.

II. Appeal against overseers' accounts.

1. Assistant overseer.

Appeal lies against the accounts of an assistant overseer, unless there be any limitation in the warrant of appointment, which prevents his being accountable to the parish.

And where, in a case stated on appeal against such accounts, the sessions find that the assistant executed all the duties of an overseer, this Court will intend that the warrant was before the justices in sessions, and was not limited as above mentioned.

The appeal against an overseer's account, under stat. 17. G. 2. c. 38. s. 4., must be made to the next practicable sessions after the account is published; that is, after it has been deposited with the churchwardens and overseers for public inspection, and the fact of depositing *bonâ fide* made known. *Regina v. Watts*, 461.

2. Time of appeal, 461. *Antd*, 1.

III. Persons and property rateable.

1. Real property combined with machinery.

In a rate laid upon buildings to which

machinery is attached for the purpose of manufacture, the real property ought to be assessed according to its actual value as combined with the machinery, without considering whether the machinery be real or personal property, and liable, or not, to distress or seizure under a *fi. fa.*, or whether it would go to the heir or executor, or, at the expiration of a lease, to the landlord or tenant. *Regina v. Guest*, 951.

2. Principle on which the rateable value is to be ascertained under the exemption clauses in canal acts.

By stat. 10 G. 3. c. 114. the company of proprietors of the canal navigation from *Leeds* to *Liverpool* were incorporated and empowered to make a canal, with towing paths, wharfs, quays, &c., and to impose tolls and duties; and it was enacted that the tolls, &c., should at all times thereafter be exempted from the payment of any taxes, rates, assessments, or impositions, other than such as the land which should be used for the purpose of the navigation would have been subject to if that act had not been made.

Stat. 23 G. 3. c. 47. (for incorporating another navigation with the canal, and for amending the preceding act) enacted that the several navigations, cuts or canals, and the tolls, &c., to be taken on the same, should at all times be exempt from the payment of any taxes, rates, assessments, or impositions, other than such as the land which had been or should be used for the purpose of such navigations, &c., were or would have been subject to if that act had not been made; and that such navigations, cuts, or canals, should not be subject to the payment of any taxes, &c., except such as had been and then were usually charged and assessed thereon; but this was not to exempt any quay, wharf, warehouse, or other house; and the clause in the previous act, exempting the tolls, &c., from taxes, rates, &c., was declared to be repealed.

Stat. 59 G. 3. c. cv. (local and personal, public), for enabling the company to make additional cuts, &c., declared that the clauses, powers, provisions, limitations, restrictions, exemptions, matters, and things, contained in the former acts (except such as had before been repealed, or were by that

act repealed or altered), should extend to the purposes of that act as if re-enacted; and that the lands, dwelling-houses, wharfs, quays, warehouses, lock-houses, and other houses of the company, should be rateable to the poor, the lands according to the quantity and quality, and the dwelling-houses, wharfs, quays, warehouses, lock-houses, and other houses, according to the nature and respective uses, dimensions, and descriptions thereof, and should be assessed in like manner as lands of a like quality, and as dwelling-houses, warehouses, lock-houses, and other houses of like and similar size, nature, dimension, or description, in the respective parishes, &c., where the same should be situate, were or should be assessed and charged; the rates, duties, and other personal property of the company to be assessed as other personal property in the said parishes, &c.

Held, on a case stated as to poor-rate in the parish of *Liverpool*, where no personal property was assessed to the poor.

1. That the land occupied by the canal, basins, and towing paths, being part of the original line, was to be rated according to the general value borne at the time of the rate by the land immediately adjoining, not excluding the value which such land derived from the vicinity of the canal, but not reckoning the value which such land would acquire if applied to the purposes of a canal.

2. That the land occupied by cuts and basins not being in the line prescribed in any of the acts, was to be rated on the same principle.

3. That wharfs and quays adjacent to the last-mentioned cuts and basins were to be rated as similar property adjacent, not excluding the value which such adjacent property derived from the vicinity of the cuts and basins. *Regina v. Leeds and Liverpool Canal Company*, 671.

IV. Liability to maintain.

Effect of mother's marriage on right to remove bastard to its settlement, 819. *Post*, V.

V. Settlement by birth.

May be acted upon notwithstanding subsequent marriage of mother.

A woman settled in parish C., bore a

bastard child there before the passing of stat. 4 & 5 W. 4. c. 76., and it was placed for nurture in parish W. She then married, and lived with her husband, in parish X., the child remaining in W. The child, becoming afterwards chargeable to W. while under the age of sixteen, was removed, by order of justices, to C.

Held, that the removal was proper, and consistent with stat. 4 & 5 W. 4. c. 76. s. 57. *Regina v. Wendron*, 819.

VI. Settlement by parentage.

1. When marriage of parents may be disputed, notwithstanding a former order removing them as man and wife, 761. *Post*, XI. 2.

2. How the settlement of a bastard is affected by mother's subsequent marriage, 819. *Ante*, V.

VII. Settlement by hiring and service.

1. Restriction of respondent to the date mentioned in the pauper's examination, 423. *Post*, XIII. 2.

2. What is an exceptive hiring.

In a case of settlement submitted to this Court by the sessions, it appeared that the pauper, on hiring himself for a year, told the master (while making the bargain) that he should want a holiday to go to his feast, and the master agreed that he should have one for that purpose. The time and duration of absence were not specified. When the feast was at hand, the pauper, on a *Sunday*, told his master that he wanted to go, and the master said he might go till *Tuesday* night, which the pauper did. The case stated, that the sessions thought a settlement was obtained, inasmuch as there was no distinct period named for the holiday, though it might be implied from the conversation that the pauper would expect, according to the contract, two or three days to go to his feast; and the sessions discharged an order removing the pauper to his birth-settlement, subject to the opinion of this Court on the above point.

Held, that the hiring was exceptive. Order of sessions quashed. *Regina v. Threkingham*, 866.

VIII. Settlement by apprenticeship.

Effect of antedating the indenture.

Father and son executed an indenture, by which the son was bound apprentice

prentice to the father, as a tailor, for seven years, antedating the instrument by two years. The sessions found that this was fraudulently done, to evade the provisions of stat. 5 *Eliz.* c. 4., and obtain the benefit of a seven years' service by serving five.

Held, that the sessions were warranted in this conclusion, and that no settlement was gained by residence under such apprenticeship, although the parish insisting on the settlement was not party to the fraud. *Regina v. Barnston*, 858.

IX. Settlement by estate.

1. What interest sufficient.

Pauper, by deed recited to be made for the purpose of paying his creditors, conveyed his freehold estates and assigned his personal property to *A.*, *B.*, and *C.*, in trust to sell, and to receive the proceeds and rents, &c. By the same deed he covenanted, on request made by the trustees, to surrender his copyhold estates in *D.* to their use, or as they should appoint, and in the meantime to stand seised of the same in trust for them; and *A.*, *B.*, and *C.*, were to stand possessed of and interested in the copyhold on the same trusts as the freehold. It was further declared that *A.*, *B.*, and *C.*, were to be possessed of, and interested in, the monies to arise or be collected as above mentioned, in trust to pay the pauper's creditors; and, if there should be any surplus, to repay it to him, his executors, &c.

While the above trusts continued, and before the copyhold was surrendered, pauper resided forty days in the parish in which the copyhold lay, but not on the estate.

Held, that he gained a settlement by such residence. *Rex v. Ardleigh*, 70.

2. What residence sufficient, 70. *Ante*, 1.

X. Settlement by renting a tenement.

1. Nature of the demise.

Where a notice, under stat. 4 & 5 *W.* 4.c. 76. s. 81., states, as the ground of appeal against an order of removal, that the pauper was settled in a third parish, not adding, as a ground, that he had no settlement in the appellant parish, the respondents are not bound to prove a settlement there.

If, in proof of a settlement by renting

a tenement, under stat. 6 *G.* 4. c. 57., a writing not under seal be produced, demising land, and also professing to demise incorporeal hereditaments, at an entire rent, evidence may be given to shew how much of such rent the land was worth. And, if the amount is 10*l.* a year, and the land has been occupied, and rent paid, according to the statute, the settlement is good.

The instrument above described reserved a rent of 7*l.*, and had a stamp of 1*l.* 10*s.* Held sufficient: and that the writing did not require to be stamped as a lease not otherwise charged, under stat. 55 *G.* 3. c. 184. sched. part I. *Regina v. Hockworthy*, 492.

2. Nature of the tenement, 492. *Ante*, 1.

XI. Order of removal.

1. Right to remove bastard to its own settlement notwithstanding mother's marriage, 819. *Ante*, V.

2. Confirmed on appeal, when not conclusive.

D. and *E.* were removed by an order describing them as man and wife, with their six children, named in the order of removal, to *W.* The order was appealed against. Pending the appeal, the parish officers of *W.* instituted a suit in the Spiritual Court, to dissolve the marriage as incestuous. After this the order was confirmed; and, subsequently, the Spiritual Court decreed the marriage incestuous, and void from the beginning to all intents and purposes. Pauper was born of the supposed marriage, before the order, but he was not named in it, and he was unemancipated, and had gained no settlement when the order was made.

Held, that the confirmation of the order, under these circumstances, was not conclusive proof of a derivative settlement of the pauper in *W.*, on appeal against an order removing the pauper to *W.* after the decree of the Spiritual Court, but that, on such appeal, *W.* might shew, by the decree, that, since the first order, the marriage had become void ab initio, and the pauper illegitimate. *Regina v. Wye*, 761.

3. Discharge of former order, when conclusive, 471. *Post*, XII. 2.

XII. Appeal against order of removal.

1. Sig-

1. Signature of notice of appeal, 471. *Post*, 2.
2. Signature of grounds of appeal.

A special case sent to this Court from sessions, on appeal against an order of removal, stated that notice of appeal was sent to the respondents, signed by four churchwardens and four overseers, therein described as the churchwardens and overseers of *M.*; that afterwards a notice of the grounds of appeal was given, signed by two churchwardens and two overseers only, therein described as the churchwardens and overseers of *M.*; and that, on the hearing of the appeal, the sessions over-ruled an objection, made by the respondents, that the appellants were bound by the description first given of the parish officers, and could not therefore put in a notice signed by two churchwardens and two overseers. Held, that the appellants were not so bound, and that from the above statement, this Court might infer that the appellants gave evidence at the sessions, explaining the difference between the notices, and shewing that the latter was signed by the proper officers.

On appeal against an order of removal, grounded on a settlement by hiring and service, the respondents discovering that the examination served by them on the appellants did not state a residence in the appellant parish, moved, at the sessions, to discharge their own order, and it was quashed, generally, with the consent of the appellants, no reason, however, being stated either to the appellants or to the justices. The respondents afterwards removed the pauper again to the same parish, no change of circumstances having intervened; and, on appeal, contended that the discharge of the former order was not conclusive, the merits not having been in question. Held, that the order was conclusive.

Per *Coleridge J.* Where an order is quashed merely because respondents decline going into their case, that is a decision on the merits. *Regina v. Church Knowle*, 471.

3. Distinction between quashing for want of form and a decision on the merits, 471. *Antè*, 2.

XIII. Grounds excluded because not specified.

1. Respondents not bound to prove their settlement where it is not disputed in the grounds of appeal, 492. *Antè*, X. 1.

2. Variance as to date.

An order of removal to *E.* was made upon an examination stating a hiring in 1813 and a service in *E.* under such hiring. On appeal, upon the ground that there was no such hiring, the respondents proved a hiring in 1810; upon which the sessions refused to go on with the case, and quashed the order. *Mandamus* to enter continuances and hear the appeal refused: 1. Because the sessions had in fact heard; 2. Because the variance was material, under stat. 4 & 5 W. 4. c. 76. s. 81.

Although it was not alleged that the appellant parish was in fact misled. *Ex parte Brosley*, 423.

XIV. Finding of sessions.

1. What the Court will intend from, 461. 471. *Antè*, II. 1. XII. 2.
2. Effect of fraud when found by sessions, 858. *Antè*, VIII.

XV. *Mandamus* to hear appeal.

Refused when sessions have decided, 423. *Antè*, XIII. 2.

XVI. Special case, 461. 471. *Antè*, II. 1. XII. 2.

XVII. Filiation.

1. Notice of application, 480. *Antè*, I. 4.
2. Powers of justices in making orders under the old law.

On application by overseers for an order of filiation, the mother and *W.*, the reputed father, being both present, two justices signed and sealed an order on the mother for payment by her of 1s. 6d. a week, and also signed and sealed an order on the reputed father for payment of the same sum. It did not appear which paper was signed and sealed first. The justices told *W.* that he was to pay 1s. 6d. a week, and delivered both papers to the overseers, directing them to keep one (not saying which), and to serve the other on *W.* They served him with the paper charging the mother. Being afterwards summoned before a magistrate for non-payment, he produced the last-mentioned paper, and alleged that it was invalid as to him. The overseers then gave

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gave him a copy of the order kept by them, which they alleged to be the correct one, and again summoned him for non-payment; and, refusing to pay, he was committed. On action brought by him against the committing magistrate, and special verdict, stating the above facts,

Held by Lord Denman and Williams J., that, a correct order being produced before the defendant, and proper steps having been taken upon it, he was bound to issue his warrant, without entering into the transactions which took place when the order was made, and that he was justified by such order.

By Littledale, Williams, and Coleridge J., that, assuming the order upon the mother to have been made first, the two justices might, at the same sitting, make another order, and declare that to be the one which they meant to enforce; and consequently that the latter order was a good justification. *Wilkins v. Hensworth*, 807.

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POSSESSION.

1. By tenant holding over, within 8 Ann. c. 14. ss. 6, 7., 110. *Landlord and Tenant*, VI. 2.
2. Writ of, 610. *Ejectment*, V.

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- I. Of sale.
In a will, when it gives the fee, 636. *Devise*, I.
- II. To impose rents for liberty of selling in a new market, when it vitiates the removal from the old market, 95. *Market*, I.

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First, on the plea side.

- I. Affidavits.
 1. Privy of party using them, 454. *Evidence*, XXIV. 1.

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2. Reading without obtaining copies, 744. *Reg. Gen.*

II. On motions. *Motion*.

III. Second application for rule on new statement of facts, 522. *Bail Court*, II.

IV. Re-opening rules.

1. Application to be made in the same term, 519. *Bail Court*, I.
2. Rule made in Bail Court, 519. *Bail Court*, I.

V. Costs on rules.

Effect of scierter, as to costs on discharging a rule, 522. *Bail Court*, II.

VI. Offices of Q. B.

Time of keeping open, 184. *Reg. Gen.*

VII. Vacation.

1. Certain extra fees discontinued, 288. *Reg. Gen.*
2. Date and title of rules, 973. *Reg. Gen.*

VIII. Capias ad respondendum.

Indorsement, 605. *Writ*.

IX. Deposit in lieu of bail, 522. *Bail Court*, II.

X. Appearance.

Proceedings in ejectment before, 14. *Post*, XIV.

XI. On interpleader rules, 580. *Statute*, XXXIX.

XII. Plea.

Delivery of plea and consent rule in ejectment, 972. *Reg. Gen.*

XIII. Commission to examine witnesses, 185. *Evidence*, XIII.

XIV. Term's notice of proceeding, when required.

Declaration in ejectment was served, and a rule obtained for judgment against the casual ejector, unless the tenant should appear and plead. The tenant did not appear, but a Judge's order was obtained for delivery of particulars to the defendant; and a like order, by consent, that the defendant should have ten days to plead after delivery of particulars. The lessor of the plaintiff took no step for a year; he then delivered particulars, and after the expiration of ten days signed judgment against the casual ejector.

Held that, after the year, the lessor of the plaintiff could not proceed without

without giving a term's notice, though the tenant had not appeared.

During the year, the attorneys for the lessor of the plaintiff had written to the tenant's attorney, inquiring what course the tenant meant to take, and threatening immediate proceedings; they had also, in conversation with the tenant's attorney, stated the proofs in support of their client's title.

Held, that such intimations did not dispense with the term's notice.

And that the judgment against the casual ejector must be set aside, but not with costs, no consent rule having been entered into, and there being, therefore, only a nominal plaintiff. *Doe dem. Vernon v. Roe*, 14.

XV. Application to stay proceedings, what does not amount to, 14. *Ante*, XIV.

XVI. Special jury.

Rule for in replevin, 973. *Reg. Gen.*

XVII. Trial.

If the marshal enters a cause as undefended, for the day on which undefended causes are taken, in *Middesex*, the defendant, if he mean to defend it, must instruct counsel to appear on that day, and state that it is defended, or, at any rate, must give the plaintiff notice to that effect. In default of this, if the plaintiff try the cause as undefended, and obtain a verdict, the defendant, though upon affidavit of merits, will be allowed to set the verdict aside only on payment of costs. *Bland v. Warren*, 11.

XVIII. Verdict.

When plaintiff is entitled to, generally on set-off pleaded to several counts, 595. *Set-off*.

XIX. Proceedings between trial and judgment.

1. Remoulding rule nisi for judgment non obstante so as to award a repleader, 557. *Master and Servant*, II. 2.

2. Setting aside verdict in a cause taken as undefended, 11. *Ante*, XVII.

3. New trial. *New Trial*.

XX. After judgment.

1. Setting aside judgment, 14. *Ante*, XIV.

2. Writ of possession, 610. *Ejectment*, V.

3. Setting off costs, 610. *Ejectment*, V.

XXI. In ejectment. *Ejectment*.

SECONDLY, at the Crown side.

XXII. On rules.

1. When absolute in the first instance on the ground of urgency, 281. *Mandamus*, VI. 3.

2. Inconsistent rules cannot be discussed together, 215. *Municipal Corporation*, IV. 8.

XXIII. Consolidation.

Several quo warranto informations having been filed on the same grounds, for exercising the office of alderman of the same corporation, one was tried, a verdict found for the Crown, and a rule nisi granted for a new trial, or to enter a verdict for the defendant. A rule nisi was then obtained for a stay of proceedings in the other informations pending the above application.

The Court discharged the rule, the prosecutor undertaking to proceed with only one other information till further order. But they refused to direct that either party should be bound by the result of such one proceeding. *Res v. Cousins*, 285.

XXIV. Staying proceedings.

Till one of several quo warranto informations is decided, 285. *Ante*, XXIII.

XXV. Writs.

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XXVI. On bringing up for judgment.

Where a defendant, having pleaded guilty to an indictment, is brought up for judgment, the counsel for the Crown is to be heard before the counsel for the defendant; and the affidavits in aggravation are to be read before the affidavits in mitigation.

Contra, where a verdict of guilty has been taken, though by consent, and without evidence.

Semble, that the rule is not to be varied where several defendants are jointly indicted, and some suffer judgment by default, and others are convicted on verdict. And in such a case, where

where there was no affidavit in aggravation, but affidavits were offered in mitigation, the Court heard the counsel for the defendants first. *Regina v. Dignam*, 593.

XXVII. Error, 58. 60. *Error*.

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I. Amount of damages recoverable from surety.

By agreement between plaintiff and S., S. was to perform certain works for plaintiff for a certain sum, and to receive from time to time three fourths of the cost of the part completed; the first payment to be made after one eighth was performed, the remaining fourth part to be paid one month after the whole was completed: if S. should fail to perform the work, plaintiff might

employ others to perform it, and deduct the expense from the sum payable to S. Defendant entered into a bond, conditioned for performance of the agreement by S.

S., after performing part of the works, abandoned the contract. Plaintiff, at the request of S., and upon new security given by him, had advanced to S., for assisting him in performing the works, a sum exceeding the whole cost of the works performed at the time of the abandonment, but less than the whole contract price. Plaintiff had the works completed at an expense which, added to the cost of the part performed by S., was less than the whole contract price agreed on with S., but which, added to the sum actually advanced to S., exceeded that contract price.

Plaintiff brought an action of debt on the bond, suggesting, as a breach, S.'s non-performance, and the plaintiff's loss thereby. Defendant pleaded non est factum. Held,

That plaintiff was entitled to nominal damages only, the loss having arisen, not from the non-performance of S.'s contract, but from plaintiff having advanced more than the contract required. Especially as the sum advanced exceeded, not only the three fourths, but the whole of the work completed; and as the advances had been made on a fresh negotiation with, and security taken from, S.

Held, also, that this answer could not be pleaded by defendant, but was properly set up, under non est factum, to meet plaintiff's evidence of damages. *Warre v. Calvert*, 143.

II. Effect of laches on the part of obligee, 143. *Antè*, I.

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To prove the title of a lessor of the plaintiff in ejectment, claiming as executor, it is sufficient (without laying ground for reception of secondary evidence) to produce minutes of the proof of the will and sealing of probate, indorsed on the will by the surrogate and registrar of the Ecclesiastical Court; it being proved also that, by the practice of the particular court, no other record of such grants is kept.

An exemplification of letters of administration de bonis non, reciting the former grant of administration, requires to be stamped only as an exemplification of a single proceeding, under stat. 55 G. 3. c. 184. sched. part II. tit. ii. *Proceedings in the Ecclesiastical Courts*.

On motion in arrest of judgment, a declaration in ejectment, stating the county in which the lands lay, but giving no further local description, was held sufficient. *Doe dem. Basset v. Mew*, 240.

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III. On libel to enforce church-rate, omitting the inhabitants of one of several townships in a parish, 880. *Ecclesiastical Law*, VI.

IV. Pleading.

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- III. When it does not lie.
 1. For want of possession and user.
A quo warranto information will not be granted for merely claiming to be a burgess of a borough, named in schedule (A.) of stat. 5 & 6 W. 4. c. 76., the party having a freedom acquired before that act, and his name being on the freemen's roll kept under s. 5., but not on the burgess list under s. 15., &c., nor on the list of voters under the Reform Act, stat. 2 W. 4. c. 45. s. 46.: at least if it does not appear that there is any corporate property in which he could claim an interest. Quære, whether such claim would be a ground for the information.
And it makes no material difference that he has voted for a member of parliament as such burgess, his name having subsequently been expunged from the

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Where a party bound in recognizance to keep the peace, is subsequently convicted at petty sessions of an assault, and the conviction is returned to the quarter sessions, the justices there are not authorised, under stat. 3 G. 4. c. 46., to order an estreat of the recognizance; but the proceeding for that purpose must be by scire facias, as before the statute.

And where the quarter sessions had made such order, this Court granted a certiorari to bring it up for the purpose of its being quashed. *Regina v. West Riding of Yorkshire*, 585.

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- I. Pleading in. An avowry not shewing who was defendant's tenant of the locus in quo, nor that the place was in lands or tenements of which defendant was seised as within his fee or seignior, is not good under stat. 21 H. 8. c. 19. s. 2. An avowry stating that J. S. held the locus in quo as tenant to defendant under a demise thereof by A. to W., at a certain rent, for a term not expired, J. S. being assignee of all W.'s estate and interest, and that rent was in arrear from J. S., is not good, by stat. 21 H. 8. c. 19. s. 2., or stat. 11 G. 2. c. 19. s. 22., or by the two conjointly. In a declaration in replevin, an insufficient

sufficient description of the goods taken, or of the locus in quo, is cured by the defendant's avowing or making cognisance: and it makes no difference that the plaintiff has demurred to the avowry or cognisance.

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- II. Rule for special jury in, 973. *Reg. Gen.*

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Assumpsit by indorsee against acceptor of a bill of exchange. Plea, that the bill was accepted for accommodation of the drawer; that after the bills were due, the drawer gave plaintiff, and plaintiff accepted from him, other bills of exchange, of larger amount, and plaintiff agreed, in consideration thereof, to give the drawer time, as to the bills now sued upon, for three months, and until default in payment of the new bills: that the new bills were given and received in payment of the bills now declared upon; and that the agreement was unknown to defendant. Replication, de injuriâ. Demurrer, on the ground that the replication attempted to put in issue more than one matter of defence.

Held, that the defendant having, upon his own shewing, set up the two matters of defence in his plea, could not take this objection.

Held also, by *Patteson J.*, that the replication of de injuriâ here was not bad as pleaded to a plea partly in denial, for that the plea contained no denial. *Reynolds v. Blackburn*, 161.

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On appeal against a conviction for a trespass, under stat. 1 & 2 W. 4. c. 52. s. 30., the appellant admitted the trespass, and offered only evidence that the property in the land was not as laid in the conviction. The sessions having rejected the evidence, and confirmed the conviction, without stating a case, this Court refused to call upon them by mandamus to hear the case, since the mistake, if any, was one of law, which this Court could not enter into, the appeal having in fact been heard, and no case sent up. *In re Pratt*, 27.

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Where a cause and matters in difference are referred at nisi prius, a motion to set aside the award may be made after the first four days of the term following the delivery of such award, although the arbitrator finds that neither party has any claim upon the other as to any matters in difference.

A plea of set-off to several counts is not divisible; and the plaintiff is entitled to a verdict generally, unless the defendant proves a set-off equalling the whole of the plaintiff's aggregate demand.

Where, therefore, to a declaration for goods sold and money paid, and on an account stated, the defendant pleaded non assumpsit and a set-off, and, the cause being referred, the arbitrator ordered a verdict to be entered for the plaintiff on both issues, except as to the count for money paid, and, so far as the issues applied to that count, for the defendant on both, the Court held the award bad in this respect. *Moore v. Bullin*, 595.

II. Of costs on an old judgment, 610. *Ejectment*, V.

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Under stat. 23 *H. 8. c. 5. s. 3.*, and a commission framed according to it, a sewer's rate assessed in gross on a township at large is bad, though laid only for defraying the expenses of the commission, and though the rate has been, in previous instances, so assessed and submitted to by the township in question. *Emmerson v. Saltmarshe*, 266.

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II. What he may do in executing a fi. fa.

1. Trespass for breaking and spoiling a lock, bolt, and staple appertaining and fixed to the outer door of plaintiff's dwelling-house, and wherewith the same was fastened. Plea, that a fi. fa. issued against plaintiff, and was delivered to defendant, being sheriff, by virtue whereof defendant, then lawfully being in a room of the dwelling-house occupied by *D.* as tenant to plaintiff, peaceably entered into the residue of the dwelling-house through the door communicating between the room and the residue, the same being then open, to take in execution plaintiff's goods then in the dwelling-house, and did take them; and because the outer door was shut and fastened with the lock, bolt, and staple, so that defendant could not carry away the goods or execute the writ without opening the outer door, nor open the door without breaking the lock, &c., and because neither plaintiff nor any other on his behalf was in the dwelling-house, so that defendant could request plaintiff or such other to open the outer door, defendant, for the purposes aforesaid, did open the outer door, and, in so doing, did necessarily break, &c., the locks, &c., doing no unnecessary damage.

Held, on demurrer, that the plea was good, though it was not shewn how the defendant entered into the house, nor who fastened the outer door; and that it sufficiently appeared that there was no other way of getting out.

2. Where the declaration complained of breaking and opening divers doors of plaintiff's dwelling-house, and breaking to pieces their locks, &c., and the plaintiff then new assigned that he

brought his action for defendant's breaking the outer door of the house; and then new assigned again that he brought his action for defendant's breaking, &c., the locks, &c., belonging to the outer door, and wherewith it was fastened: Held, that the second new assignment was not bad, inasmuch as, under the complaint of breaking the outer door, plaintiff might give evidence of breaking the locks, &c.; and that the second new assignment, and the plea to it, raised the question, whether the sheriff, under the circumstances in the plea, might break open the outer door, as if the declaration had been merely for breaking the lock, &c., of the outer door. *Pugh v. Griffith*, 827.

III. Relief of, on interpleader rule, where the execution creditor does not appear, 580. *Statute*, XXXIX.

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I. Bill of lading.

1. When not conclusive against the shipowner.

Declaration, in assumpsit, stated that defendants *W.* and *N.* were owners of a ship; that, in consideration that plaintiff at their request shipped goods on board to be delivered to him, *W.* and *N.* promised to deliver: breach, non-delivery. *N.* pleaded separately, and traversed the shipment. On the trial, plaintiff produced a bill of lading, signed by the captain of the ship, transmitted to plaintiff by *W.*, stating the goods to be shipped by *W.*, to be delivered to plaintiff or his assigns. Proof also was given to shew that plaintiff held the bill for value. *W.* was the managing owner.

Held,

Held, that *N.* might produce evidence that the goods were not shipped in fact, and was not estopped by the bill of lading, supposing such estoppel to exist in general, inasmuch as the plaintiff could support his issue only by making *W.* his agent, and if *W.* was so, the plaintiff was cognisant, through him, of the fact.

Quære, whether, generally, a bill of lading be conclusive evidence of the shipment, as against the shipowner, in favour of a holder of the bill for value. Semble, per *Littledale J.*, that it is not. *Berkley v. Walling*, 23.

2. Different position of consignee and indorsee, 29. *Ante*, 1.

II. Evidence of shipment, 29. *Ante*, 1.

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VI. Navigation of the river *Thames*.

To what vessels the *London* bye-laws extend.

Stat. 7 & 8 G. 4. c. lxxv. (local and personal, public), empowering the Court of Mayor and Aldermen of *London* to make bye-laws for regulating "the boats, vessels, and other craft to be rowed or worked" between *Windsor* and *Yantlet Creek*, extends to steam-boats. And,

The master of a *Gravesend* and *London* steam-boat of 187 tons was held liable to the penalty imposed by such bye-law, for navigating at a speed forbidden by it. *Tisdell v. Combe*, 788.

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I. Sale of advowson after avoidance by accepting a living.

Plaintiff, being incumbent of the living of *C.*, which was under the annual value of 8*l.*, accepted the living of *O.*, with cure of souls. Afterwards, the patron of *C.* sold the advowson to *L.*;

and *L.* presented a clerk, who was instituted and inducted, and subscribed the Articles.

Held, that the living, as against the patron, was void by plaintiff's acceptance of *O.*, and disannexed from the advowson; that, consequently, it did not pass by the sale; that *L.*'s presentee was not incumbent; and that plaintiff, not having been ousted de facto, might sue for the tithes.

And that it made no difference, as to this, whether the patron of *C.* or his vendee knew or did not know of plaintiff's acceptance of *O.*

By the Court of Exchequer Chamber, reversing the judgment of the Court of *K. B.* *Alston v. Atlay*, 289.

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Sec. 1. Delivery of bill before commencing action, when not required, 956. *Attorney*, VII. 1.

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Sec. 4. Contract for an interest in lands.

Declaration stated that defendant wished plaintiff to hire of her a house, and furniture for the same, at the rent of &c.; and thereupon, in consideration that plaintiff would take possession of the said house partly furnished, and would, if complete furniture were sent into the said house by defendant in a reasonable time, become tenant to defendant of the said house, with all the said furniture, at the aforesaid rent, and pay the same quarterly, from a certain day, to wit &c., defendant promised plaintiff to send into the said house, within a reasonable time after plaintiff's taking possession, all the furniture necessary, &c.

Held, that the defendant's agreement to send in furniture was an inseparable part of a contract for an interest in lands, and therefore came within stat. 29 *Car.* 2. c. 3. s. 4., which, in the case of such contract, requires the agreement, or a memorandum thereof, to be in writing. *Mechelem v. Wallace*, 49.

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Sec. 19. The provision that unstamped drafts, &c., shall not be given in evidence is incorporated in stat. 55 G. 3. c. 184., 114. *Post*, XXIII. 1.

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XXI. 38 G. 3. c. 78. (Newspapers.)

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XXII. 39 & 40 G. 3. c. 94. (Custody of insane persons charged with offences.)

Sec. 2. Practice on refusal to plead, 536. *Insanity*, I.

XXIII. 55 G. 3. c. 184. (Stamps.)

1. Sec. 8. Incorporation of provisions in former acts.

The enactment of stat. 31 G. 3. c. 25. s. 19., that no bill, draft, or order, &c., shall be given in evidence or available in law unless the paper be lawfully stamped, is incorporated in stat. 55 G. 3. c. 184., by sect. 8.

In an action on a banker's cheque, the objection that it was post-dated and not properly stamped ought not to be specially pleaded.

Where a document produced on a trial would, from some defect, be inadmissible if objected to, the practice in general is, that if such document has been put in and read, the objection cannot afterwards be taken. But where the defect requires extrinsic evidence to shew it, as where a cheque has been post-dated, the instrument is to be read, and the ground of objection afterwards proved as part of the defendant's case. *Field v. Woods*, 114.

2. Sched. part I. Lease not otherwise charged, 492. *Poor*, X. 1.

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XXIV. 55 G. 3. c. 192. (Devise of copyholds.)

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XXVI. 58 G. 3. c. 69. (Vestries.)

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XXIX. 3 G. 4. c. 72. (Church building.)

Sec. 20. Liability to repair, 880. *Ecclesiastical Law*, VI.

XXX. 5 G. 4. c. 84. (Transportation.)

Sec. 21. Fee to clerk of court.

By stat. 5 G. 4. c. 84. s. 21., in the case of convicts sentenced to transportation, or convicted of capital offences and pardoned on condition of being transported, the clerk of the court in which the offender is convicted is to be paid by the treasurer of the county, &c., "the same fee as hath been usually paid, and he is lawfully entitled to receive, for every order or transportation." Held,

1. That the clerk of every such court is entitled to receive such fees as can be proved to have been usually in fact paid to the clerk of that particular court for such order.

2. That, where the fees had been paid, without variation as to amount, as long as could be recollected down to the time of a particular clerk, and to him for the first four years after he entered upon the office, but not for

the residue of the term (forty-five years) during which he held it, this could not of itself so interrupt the course of usual payment, as to prevent a mandamus issuing to the treasurer to pay the fees to the successor of such clerk.

Although previous statutes had provided for the payment, by the treasurer to the clerk, of the same fee as had been usually paid, or the clerk was entitled to; and although, still earlier, and down to the latest receipt of the fees in the particular court, they had been paid, not by the treasurer, but by the contractors for transportation.

Punishment by hard labour was first introduced by stat. 5 Ann. c. 6.; since that time several statutes have provided for it, both by original sentence and by way of commutation. Some of these statutes, which expired in 1802, provided that the clerk of the court should give a certificate, for which he should receive the same fee as was usually paid on orders of transportation. Since 1802, the clerk of the court of gaol delivery of *Newgate* had continued to give the certificates, and, down to 1805, he had received the fees for them. Held, that he was not now entitled to receive any fees, the statutory enactment having expired, and no usage existing, inasmuch as the act of giving certificates had been originally performed under statute. *Regina v. Baker*, 502.

XXXI. 6 G. 4. c. 57. (Settlement of Poor.)

Sec. 1. Settlement by renting a tenement under parol demise of hereditaments partly incorporeal, the rent of the land being above 10*l.*, 492. *Poor*, X. 1.

XXXII. 7 G. 4. c. 57. (Insolvent debtors.)

1. Sec. 19. Form of assignment by provisional assignee to creditor assignee.

Under stat. 7 G. 4. c. 57. s. 19., an assignment by the provisional assignee to the creditor assignee is valid if it pursue, *mutatis mutandis*, the form annexed to the act for the conveyance by the insolvent to the provisional assignee, under sect. 11.

And this independently of stat. 11 G. 4. & 1 W. 4. c. 38. s. 7., passed sub-

sequently to the execution of the assignment.

Supposing it necessary to resort to the later statute, *quære*, whether evidence, sufficient to go to a jury, of the conveyance having been made "in obedience to any order" of the Insolvent Debtors' Court, be given by producing a copy of the counterpart, sealed with the seal of that court, and certified by the provisional assignee, such counterpart reciting that the conveyance is made by order of the Court?

Semble, per Lord *Denman* C. J., *Littledale*, and *Williams* Js., that it is not; per *Coleridge* J., that it is. *Doe dem. Broughton v. Storey*, 909.

2. Sec. 32. Assignment after commencement of imprisonment, when void, 869. *Insolvent Debtor*, II.

XXXIII. 9 G. 4. c. 14. (Written memorandum.)

Sec. 6. Representation of character.

B., a trader, being in bad circumstances, and indebted to defendant, asked plaintiff for a supply of goods on credit, and referred him to defendant as to her character. Defendant had dealt with *B.* some time, to the amount of several hundreds of pounds, but *B.* had latterly fallen into arrear in payments, and defendant had consequently ceased supplying her with goods, but had gone on again upon her undertaking to discharge her arrears at a certain sum per week. Plaintiff enquired of defendant's shopman as to *B.*'s credit, and defendant, on reference made to him by the shopman, said that he might give her a fair character. The shopman thereupon made a verbal representation to plaintiff, in consequence of which he trusted *B.* with goods. *B.* never paid for them, but sold them, and paid the proceeds to defendant, in discharge of her debts to him. Plaintiff brought an action for money had and received against defendant for the amount so paid.

Quære, whether, in such an action, stat. 9 G. 4. c. 14. s. 6. would have precluded plaintiff from giving evidence of the unwritten representation, if it had formed part of a fraudulent transaction, the other circumstances of which were proved by evidence independent of such representation. But (assuming that the effect of the evidence here

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here would have been to shew a deceitful representation, knowingly sanctioned by the defendant),

Held, that evidence of such representation could not be admitted, the only proof of fraud in the defendant being the representation itself. *Haslock v. Fergusson*, 86.

XXXIV. 11 G. 4. & 1 W. 4. c. 36. (Contempts in equity.)

Sec. 15. rule 5. Defendant in custody for not answering, his right to be discharged, 167. *Contempt*.

XXXV. 11 G. 4. & 1 W. 4. c. 38. (Insolvent debtors.)

Sec. 7. Evidence that a conveyance by provisional assignee was by order of the Court, 909. *Ante*, XXXII. 1.

XXXVI. 1 W. 4. c. 21. Prohibition and mandamus.

1. Sec. 1. Costs of first trial of prohibition, where a new trial is granted, 897. *n. Costs*, I. 3.

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XXXVII. 1 & 2 W. 4. c. 22. (Hackney carriages.)

Sec. 30. Appointment of stands, 773. *Hackney Carriage*.

XXXVIII. 1 & 2 W. 4. c. 32. (Game.)

Sec. 30. Evidence in defence on charge of trespass, 27. *Sessions*, I. 5.

XXXIX. 1 & 2 W. 4. c. 58. (Interpleader.)

Sec. 6. Relief of sheriff as against execution creditor.

Goods, being seized by the sheriff under a *fi. fa.*, were claimed adversely to the execution creditor. On an interpleader rule obtained by the sheriff under stat. 1 & 2 W. 4. c. 58. s. 6., the claimant and the sheriff appeared, but not the execution creditor. The claimant supported his title by affidavit.

The Court refused to order generally that the execution creditor should be barred of his demand; but made a rule that the sheriff should withdraw from possession, and the execution creditor take no proceedings against him *in respect of the goods now claimed*. *Doble v. Cummins*, 580.

XL. 2 & 3 W. 4. c. 45. (Parliamentary reform.)

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Sec. 46. Franchise of freeman not on the list of voters, 745. *Quo Warranto*, III. 1.

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Secs. 1. 4. 5. Periods with reference to which uninterrupted user shall be pleaded, 698. *Pleading*, XIII.

XLII. 3 & 4 W. 4. c. 42. (Amendment of the law.)

Sec. 2. Action against administrator for injury to real property by the intestate, 426. *Executor*, II.

XLIII. 4 & 5 W. 4. c. 76. (Poor.)

1. Sec. 57. Effect of husband's liability to maintain wife's bastard, 819. *Poor*, V.

2. Sec. 71. Removal of bastard to mother's maiden settlement, notwithstanding her subsequent marriage, 819. *Poor*, V.

3. Sec. 75. Majority of officers to sign notice of application in bastardy, 480. *Poor*, I. 4.

4. Sec. 81. Examination. Variance in date of hiring and service, fatal, 425. *Poor*, XIII. 2.

5. Sec. 81. Respondent not put to prove his settlement, if it is not disputed in the grounds of appeal, 492. *Poor*, X. 1.

XLIV. 5 & 6 W. 4. c. 76. (Municipal corporations.)

1. Sec. 5. Having name on freemen's roll, when not sufficient user of franchise to support *quo warranto*, 745. *Quo Warranto*, III. 1.

2. Secs. 37. 43. Election of councillors. Notice of disqualification. At an election of councillors under stat. 5 & 6 W. 4. c. 76., if there be a disqualification rendering any person ineligible, notice of it should properly be given at the time of election.

Quære, whether, in default of such notice, where the party is disqualified by being an assessor, and it appears that the electors must have known of his being so, votes given for him are thrown away, by the operation of stat. 7 W. 4. & 1 Vict. c. 78. s. 15.? *Regina v. Hiorns*, 960.

3. Secs. 47. 52. Mode of ascertaining vacancy of office of councillor.

Where a town councillor, elected under stat. 5 & 6 W. 4. c. 76., has, during

during his term of office, been put out of the burgess roll by the overseers for alleged non-payment of rates, but continued to exercise the office, the Court will not, on affidavit of those facts, and of the alleged default, issue a mandamus to the mayor, or alderman of the ward, to proceed to a new election. The vacancy must be first ascertained by judgment on a quo warranto information. *Regina v. Phippen*, 966.

4. Secs. 50. 51. Acceptance of office.

Office of town councillor, when full, 215. *Municipal Corporation*, IV. 8.

5. Sec. 52. Election of councillors. Vacancy by bankruptcy.

At an election of councillors for a ward, under stat. 5 & 6 W. 4. c. 76., there was one vacancy only, by rotation. A councillor had also become disqualified, under sect. 52., by bankruptcy, but the council had omitted to notify the vacancy. Two days before the commencement of the poll, the mayor, with the consent of the aldermen and assessors of all the wards, gave a notice (purporting to be published with such consent) of the polling-places, and stated also in such notice that the burgesses were required to elect two councillors for the above ward. A majority of the burgesses gave votes for two candidates jointly, others voted for a third candidate singly.

Held, that the single candidate, having the only available votes, was elected; and that the notice, being given without authority as to electing two councillors, did not prevent the double votes from being thrown away. *Regina v. Leeds (Mayor, &c.)*, 963.

6. Mandamus does not lie to admit town councillor when the office is full, 419. *Mandamus*, II. 2.

7. Sec. 66. Compensation.

The town clerk of a borough dying, one of the capital burgesses vacated that office, and was appointed town clerk, nine days before the passing of the Municipal Corporation Act, 5 & 6 W. 4. c. 76. On January 1st he was removed. He applied to the town council for compensation, and they refused to grant any. He then appealed, under sect. 66. of the act, to the Lords of the Treasury, who decided that he was entitled to no compensation.

Quære, whether the Lords of the Treasury have jurisdiction, under stat. 66., where the town council has refused any compensation. But,

Held that, under the circumstances, none but a nominal compensation was to be expected; and that, in such a case, the Court would not grant a mandamus to the corporation to assess compensation.

Quære, whether this Court can review a decision of the Lords of the Treasury under sect. 66. of the act, if made within their jurisdiction. *Ex parte Lee*, 139.

8. Sec. 66. Who is a borough officer entitled to compensation.

A local act empowered the mayor, bailiffs, and burgesses of a borough to appoint, and also from time to time to displace and remove, a collector of quay and harbour duties, which were to be paid to the mayor, bailiffs, burgesses, and commonalty, under the act, for goods exported and imported, &c.; they were also enabled to allow such collector a salary out of the duties. The act recited that the mayor, bailiffs, burgesses, and commonalty had, time out of mind, received and managed such duties as trustees; and it prohibited their being applied to any purpose but those of the quay and harbour, &c. The fund arising from such duties had, in fact, always been kept distinct; and the corporation had exercised no control over it, except for the purposes of the local act. *E.* was appointed collector, at a salary, under that act.

After the passing of stat. 5 & 6 W. 4. c. 76., the council, elected for the borough, continued the office of collector, but appointed another person in place of *E.*

Held, that *E.* was not entitled to compensation by stat. 5 & 6 W. 4. c. 76. s. 66., as a person removed from his office under the provisions of that act.

Quære, whether, before his removal, he was an officer of the borough, within the meaning of s. 66.? *Regina v. Poole*, 730.

9. Sec. 66. Assistant to borough officer, when not entitled to compensation.

By a resolution of the corporation of Bath, a person was directed to attend upon and assist the chamberlain of

of the city in the various business of his office, under the direction of the committee for inspecting the chamberlain's accounts. The appointment was during good behaviour, at an annual salary, payable quarterly. The person so appointed retiring, *H.* was, in 1810, requested by the then chamberlain to accept the office of assistant chamberlain; and the corporation, in common hall, on the chamberlain's statement that he wanted a person in place of the late assistant, resolved (but the resolution was not communicated to *H.*) that the chamberlain should be authorised to employ such fit and proper person to assist him in his said office as he should think proper. The chamberlain told *H.* that he was appointed, and *H.* entered upon the duties. A new chamberlain being afterwards appointed, the corporation, by a resolution in common hall, resolved that *H.* should be recommended to the new chamberlain as his assistant; and he was continued in that employment. On the passing of stat. 5 & 6 *W. 4. c. 76.*, a new town council was appointed, and a committee named by them recommended that the office of assistant chamberlain should be discontinued, which was accordingly done.

Held, that the employment of assistant chamberlain under these circumstances was not an office for which compensation could be claimed under stat. 5 & 6 *W. 4. c. 7. s. 66. Ex parte Harvey*, 739.

10. Sec. 92. Notice of appeal against borough rate.

Notice of appeal against a borough rate, under stat. 5 & 6 *W. 4. c. 76. s. 92.*, must be given to the town clerk of the borough. And, though the borough be a county of itself, having quarter sessions, a recorder, and a clerk of the peace, under sect. 103., notice to such clerk of the peace is not necessary. *Regina v. Carmarthen (Recorder)*, 756.

11. Sec. 132. Certiorari.

Sec. 132. of stat. 5 & 6 *W. 4. c. 76.* takes away certiorari in the case of an order of borough sessions quashing an appeal against a rate (in the nature of a county rate) made under sect. 92. *Regina v. Rippon (Justices)*, 417.

XLV. 7 *W. 4. & 1 V. c. 78.* (Municipal corporations.)

1. Secs. 1. 20. Proceedings already commenced, how discontinued.

Before the passing of stat. 7 *W. 4. & 1 Vict. c. 78.*, a rule nisi was obtained for a quo warranto information against a party elected assessor of *Carnarvon*, since 25th December 1835, on the ground that the party presiding at the election as mayor had no title.

After the passing of the act, the defendant not having paid the costs of the proceeding up to that time, the Court made the rule absolute.

Sect. 1. of stat. 7 *W. 4. & 1 Vict. c. 78.*, which cures certain defects in municipal elections, is subject, so far as relates to proceedings commenced before the passing of the act, to sect. 20., which provides for the discontinuance of such proceedings only on payment of costs. *Regina v. Jones*, 430.

2. Sec. 2. What defective proceedings cured.

A defect in the first election of aldermen for a borough, under stat. 5 & 6 *W. 4. c. 76.*, by reason of which (as is alleged) the proper number was not elected, is cured by stat. 7 *W. 4. & 1 Vict. c. 78. s. 2.*

Where a defect of title has been so cured after proceedings in quo warranto commenced, such proceedings are not actually discontinued by virtue of sect. 20.; but a right immediately accrues to apply for a discontinuance, on payment of costs by defendant to prosecutor. Either party may make the application.

And it is too late to apply if the proceedings have been allowed, after the passing of the act, to go on to a decision, as a judgment of the Court on demurrer. *Regina v. Roberts*, *W. L.* 433.

3. Sec. 15. Ineligibility of assessor to be councillor, 960. *Ante*, XLIV. 2.

4. Sec. 20. Discontinuance on payment of costs.

If a quo warranto information has been filed on account of a defect of title, which is afterwards cured by stat. 7 *W. 4. & 1 Vict. c. 78.*, and the prosecutor does not apply for a discontinuance immediately on the passing of the act, and further costs are afterwards incurred, the Court, on a subsequent

sequent application (before the case is finally decided), will allow him to discontinue, but with costs only down to the passing of the act.

Although the reason of the delay was, that the question, whether or not the act made the title good, was depending in another case which would govern the present, and the prosecutor applied as soon as possible after that case was decided.

On motion by prosecutor, as above, for a discontinuance, the Court refused to allow him costs of the application. *Regina v. Roberts*, 441.

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Held, that the question whether this tender was conditional or unconditional was proper to be left to the jury. *Eckstein v. Reynolds*, 80.

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